IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

SARA DUCLOS
Claimant

RETLAWS AT THE LAKE
Employer

APPEAL . 07A-UI-02357-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09-03-06 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 28, 2007, reference 07, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 26 and 27, 2007. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Mike Nelson, General Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One, Two and Three were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time server for Retlaws at the Lake from December 26, 2005 to February 6, 2007. She was discharged for excessive absenteeism and tardiness and called in to report she would not be at work one to two times per week on average. On September 4, 2006, the claimant received a written warning after she experienced a foot condition and was off and on work for the next three weeks. She was off work for three days initially but chose to work rather than follow her doctor's instructions. On September 3, 2006, she said she needed to leave work to see her physician about her foot and the employer gave her permission but heard her state as she was leaving that she was going to Wal-Mart and then she quit limping. On September 4, 2006, she called in and said her foot was still bothering her and she would not be in because she needed to go back to her doctor. She did not find a replacement worker as was the employer's policy. The warning also stated that if her conduct continued it "may/will result in suspension of hours and/or voluntary termination" (Employer's Exhibit One). On October 25, 2006, she received a written warning after she asked for October 28, 2006, off work so she could train at another job. The manager told her to talk to General Manager Mike Nelson and the claimant called Mr. Nelson a "fucking asshole" and said she would not talk to him. She was warned for using profanity and insubordination. The warning further stated "any further conduct will result in and/or a suspension of hours and/or termination immediately" (Employer's

Exhibit Two). On February 2 and 3, 2007, the claimant called in approximately ten minutes before the start of her shifts and said she was ill. She did have a doctor's excuse for her absences but the employer determined her absences were excessive and because she had received many warnings and was not reliable her employment was terminated (Employer's Exhibit Three).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant's absences may have been excessive, the documented absences do not demonstrate excessive unexcused absenteeism. Although it is inconvenient to document each absence or tardy it is important to do so in order that "excessive" may be judged impartially rather than by one party or the other's personal definition. If the claimant did indeed call in one or two times a week without medical documentation that would certainly be excessive. In this case, however, the dates of those call-ins were not recorded and the administrative law judge cannot solely rely on the employer's estimations and memory. Additionally, the claimant's absences February 2 and 3, 2007, were covered by a doctor's note and are considered excused regardless of whether the employer is suspicious of how the claimant was able to obtain the excuse, short of proof of something like forgery or fraud. The administrative law judge is aware the employer is going to be disappointed with this decision. Consequently, a brief education on unemployment law may be helpful. Rarely will a claimant be disqualified from receiving unemployment insurance benefits if she provides a doctor's excuse for her last absence because as the Cosper case states absences due to properly reported illness are not misconduct because illness is not volitional or within an individual's control. If, for example, the employer had terminated the claimant's employment based on the October 25, 2006, situation when she called him a "fucking asshole," it is more likely that she would have been denied benefits, depending on other circumstances such as prior conduct and warnings. In this case, however, because the final absence was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and benefits must be allowed.

DECISION:

The February 28, 2007, reference 07, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/css