IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRITNEY A GREEN
Claimant

WILD ROSE CLINTON LLC
Employer

APPEAL NO: 12A-UI-08990-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/10/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wild Rose Clinton, L.L.C. (employer) appealed a representative's July 17, 2012 decision (reference 03) that concluded Britney A. Green (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 20, 2012. The claimant participated in the hearing. Stacey Hendricks appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on June 30, 2011. She worked part time (about 30 hours per week) as a food and beverage server working on the buffet and in banquets. Her last day of work was May 30, 2012. The employer discharged her on June 1, 2012. The reason asserted for the discharge was excessive absenteeism.

The employer does not record the reasons for an absence unless the employee provides a doctor's excuse, in which case the absence is not counted towards the employer's seven-points of allowed unexcused absences. The claimant carried over 1.5 points from 2011 into 2012. In 2012 she called in an absence on January 11 (1.0 point), was late on February 14 (.5 point), was considered a no-call, no-show for a shift on April 11 (3.0 points), was absent for one of her two shifts on April 12 (1.0 point), was late on April 13 (.5 point), and was late on April 14 (.5 point), was late on May 11 (.5). She had been given a "first written/final warning" on April 23

indicating that she was at 8.5 points, and then was given a second final warning on May 12, indicating that she was at 9.0 points.

The claimant indicated that the tardy in February was due to arriving late after being delayed returning from a doctor's appointment, and that the tardies in April and May were due to her having difficulty finding appropriate child care those days for her two-year-old child who was sick and could not go to the regular child care provider. She further indicated that the shifts she missed on April 11 and April 12 had been added after the schedule had originally been posted and that she had not been informed that the schedule had been changed to include her; she did not know until after the fact that she had been added to the schedule.

The claimant's final absence was on May 27. She was scheduled to work the buffet schedule from 11:00 a.m. to 3:00 p.m. She called at approximately 10:00 a.m. to say she would be absent; she had locked her keys in her car, and while she was taking steps to attempt to get the car unlocked, she realized that she would not be able to accomplish this in time to make her shift. As a result of this additional occurrence after the May 12 final warning, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even

if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Generally, absenteeism arising out of matters of purely personal responsibility such as childcare is not excusable. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). However, an absence or a tardy due to the inability to obtain care for a sick infant or small child has been held to not be misconduct, even where excessive. *McCourtney v. Imprimis Technology, Inc.*, 465 N.W.2d 721 (Minn. App. 1991). Tardies are treated as absences for purposes of unemployment insurance law. *Higgins*, supra. In order to be intentional, an attendance incident must have occurred despite the claimant's knowledge that the occurrence would be counted against her. *Cosper*, supra; *Higgins*, supra.

In this case, while the final incident on May 27 was an unexcused occurrence, the employer has not established that the claimant had excessive absences which would be treated as unexcused for purposes of unemployment insurance eligibility. The vast majority of the prior occurrences were due to a reason which would be considered excused, such as tardiness due to the illness of a small child, and where an occurrence is counted where the claimant was not on notice that she was scheduled to work. Because the employer has failed to establish by a preponderance of the evidence that the claimant had excessive unexcused absences, it has not met its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 17, 2012 decision (reference 03) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs