

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REBECCA R ALON
Claimant

APPEAL NO: 13A-UI-06050-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED STATES CELLULAR CORP
Employer

OC: 04/21/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Rebecca R. Alon (claimant) appealed a representative's May 9, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with United States Cellular Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 27, 2013. The claimant participated in the hearing. Tracy Alberts appeared on the employer's behalf and presented testimony from one witness, Nichole Cochrane. 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:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on July 7, 2008. She worked full time as a help desk representative at the employer's Cedar Rapids, Iowa call center. Her last day of work was April 22, 2013. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer had given the claimant a final written warning on February 17, 2013 advising the claimant that she was using excessive sick leave for absences. The claimant had previously been taking sick leave and FMLA (Family Medical Leave) due to chronic migraines. Unbeknownst to her, she had exhausted her FMLA allowance sometime in the proximity of February 17.

The claimant had an eleven-day period of absence from March 22 through April 9, 2013, and a seven-day period of absence from April 11 through April 19, 2013. She called in each day to

report her absences. The reason for these absences was because of reoccurrence of her migraines. She intended to seek FMLA coverage for these periods of absence, but then learned that she had exhausted her FMLA eligibility. Because these absences then were not covered by sick leave or FMLA, the employer determined to discharge 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). The FMLA provisions in particular were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. It is the employer's burden to establish that the claimant's absences were unexcused; particularly where the claimant has provided some testimony asserting that the absences were for illness, it is not the claimant's burden to establish further that the absences were for bona fide illness. The employer has provided no evidence to the contrary of the claimant's assertion that the final absences were due to bona fide illness. Because the final absences were related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet 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 May 9, 2013 decision (reference 01) is reversed. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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