

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE M SMITH
Claimant

APPEAL NO: 12A-UI-11579-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 08/19/12

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's September 19, 2012 decision (reference 01) that concluded Nicole M. Smith (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 November 16, 2012. The claimant participated in the hearing. Alyce Smolsky of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Jayme LeJeune and Amanda Bradac. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. 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.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Is the employer's account subject to charge?

OUTCOME:

Affirmed. Benefits allowed. Employer is not subject to charge in current benefit year.

FINDINGS OF FACT:

The claimant started working for the employer on June 5, 2012. She worked full-time as a certified nursing aide (CNA) in the employer's Dubuque, Iowa nursing and rehabilitation center. Her last day of work was August 17, 2012.

The claimant primarily worked the 6:00 a.m.-to-2:00 p.m. shift. On August 17 the claimant spoke to the director of nursing, Bradac, and requested and was granted permission to leave work at about 10:00 a.m., as the claimant had just been informed that her father in Wisconsin had just been taken to the hospital.

The claimant had not originally been scheduled to work on August 20, but prior to August 17 had agreed to cover a shift for another worker. That schedule change had been approved by the employer, and so the claimant became obligated to work the shift or find another replacement. The claimant made attempts to get the shift scheduled, and one coworker had agreed to cover the shift, so the claimant did not give it further thought, but apparently that coworker ultimately did not cover the shift. As no additional change in coverage had been approved by the employer, the employer considered the claimant a no-call, no-show for the shift.

The claimant was next scheduled to work a shift on August 22. She was still at the hospital with her father at the time. She had intended on calling in to report she would be absent, but had not done so by 6:15 a.m. on that day, when she turned on her phone and received a voice message from the charge nurse on duty inquiring where she was. The claimant then returned the call and told the charge nurse that she was still at the hospital with her father; the charge nurse told her that if she could not get to work that day, she should not bother coming back at all. The employer treated the absence as a no-call, no-show, and later on August 22 the administrator, LeJeune, concluded that the claimant's employment was terminated under the employer's two no-call, no-show discharge policy.

The claimant understood that she was discharged and so did not report back to work when she returned to Dubuque on or about August 25. Later that week, she went in to the facility and turned in her uniform and got her check from LeJeune. LeJeune did not make any reference to the claimant's employment status and made no inquiry regarding what had happened to cause the separation.

The claimant established an unemployment insurance benefit year effective August 19, 2012.

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 that 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 that 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).

The reason cited by the employer for discharging the claimant is her two absences from work on August 20 and August 22, 2012, treated by the employer as no-call, no-shows. The employer had some reason to know as of August 17 that there could have been factors affecting the claimant's ability to report for work in the days that followed. While the claimant could have done better in informing the employer as to her status and of her efforts to find coverage for August 20, under the circumstances of this case the claimant's failure to better communicate was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good-faith error in judgment or discretion. As to her failure to further communicate with the employer after August 22, the claimant reasonably concluded that she had been discharged; even if the charge nurse might not have had the authority to discharge the claimant, in fact the administrator had made a decision to discharge the claimant. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began April 1, 2011 and ended March 31, 2012. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's September 19, 2012 decision (reference 01) 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. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw