

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LISA KERNS**

Claimant

**APPEAL NO. 11A-UI-02423-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALLIANT ENERGY CORPORATE SVCS INC**

Employer

**OC: 09/26/10**

**Claimant: Appellant (2/R)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Lisa Kerns (claimant) appealed a representative's February 17, 2011 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Alliant Energy Corporate Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 13, 2011. The claimant participated in the hearing. Deborah Neyens, attorney at law, appeared on the employer's behalf and presented testimony from two witnesses, Toni Bergen and Cindy Gunther. 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?

**FINDINGS OF FACT:**

The claimant started working for the employer on August 8, 2008. She worked full-time as a call center representative in the employer's Cedar Rapids, Iowa center. Her last day of work was December 16, 2010. The employer discharged her on January 11, 2011. The reason asserted for the discharge was excessive absenteeism and exhaustion of FMLA (Family Medical Leave).

The claimant had been diagnosed with depression, which caused her to frequently be unable to leave her home. As a result, she missed a substantial amount of work between August and November, which was covered by FMLA. She was allowed some extended leave and short-term disability but did return to work for a time in December. Beginning December 17, she again began calling in absences for illness. There was a series of communications, primarily through email, in which the claimant indicated that she had not been released by her doctor to return to work and the employer asked that she provide medical documentation so they might consider an extended leave. On January 5, 2011, the employer indicated that it needed to get the paperwork from the claimant by January 11. On January 11 the claimant responded that she was unable to get to her doctor in order to get additional paperwork. As a result, on January 11 the employer advised the claimant that it was proceeding with termination.

The claimant indicated that she subsequently was released by her doctor for part-time work approximately January 21, but was not able to work full-time until the end of February or into March 2011.

#### **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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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); 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. Here, the employer knew or should have known that the claimant would be absent for an extended period of time. Floyd v. Iowa Dept. of Job Service, 338 N.W.2d 536 (Iowa App. 1986).

Because the final absence was related to a known 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.

An issue as to whether the claimant was able and available for work during weeks in which she seeks unemployment insurance benefits arose as a consequence of the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

**DECISION:**

The representative's February 17, 2011 decision (reference 02) 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. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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