IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PATRICIA PLASCENCIA DE VEGA
Claimant

CLOVERLEAF COLD STORAGE
Employer

APPEAL NO: 11A-UI-16170-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Patricia Plascencia de Vega (claimant) appealed a representative's December 9, 2011 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Cloverleaf Cold Storage (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 13, 2012. The claimant participated in the hearing and was represented by Dennis McElwain, attorney at law. Donna Hirsch appeared on the employer's behalf. One other witness, Veronica Rivera, was available on behalf of the employer but did not testify. During the hearing, Claimant's Exhibits A, B, and C 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 claimant eligible for unemployment insurance benefits by being able and available for work?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on February 7, 2008. She worked full-time as a general laborer. Her last day of work was June 29, 2011. Beginning June 30, the claimant was on a leave of absence due to medical issues.

The claimant's initial medical issues dealt with having an injury to her tendons, hands, and joints due to a fall at home. She had a release dated September 27 indicating she could return to work on October 11. However, she became ill with a blood illness and kidney abscess, resulting

in her being hospitalized on October 7, and was not discharged until late on October 11. On October 13 the claimant's doctor issued an excuse covering her until October 27. However, when the doctor's office attempted to fax this to the employer, it faxed the note to a wrong number, so the employer did not immediately get the note. Without the doctor's note, the employer considered the claimant's absence since October 11 to be unexcused, and so on October 14 sent a letter advising the claimant that her job was being ended due to her attendance.

On October 26 the claimant contacted the employer to inquire about her employment. At that time, she learned the employer had not received the October 13 doctor's note; she arranged for the doctor's office to resubmit the note to the correct fax number on October 27. As of October 27, the claimant's doctor had released her to return to work without any restrictions. However, when the employer reviewed the claimant's attendance record, it still considered her absences from October 11, October 12, and October 13 to not have been properly called in and reported, and assessed her four points for each occurrence. With prior absences due to illness in March and April, this brought the claimant to 17 points under the employer's 16 point attendance policy. As a result, the employer reaffirmed its discharge decision to the claimant on November 1.

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). In this case, the employer asserts that the health-related reasons for the final absences were not properly reported. However, it is clear that the claimant's failure to report her absences for October 11, October 12, and October 13 were not volitional, as she was extremely ill during that period, even still being hospitalized on October 11. Misconduct connotes volition. There is no evidence the claimant intentionally failed to report the reasons for her continued absence to the employer. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). Further, here the employer knew or should have known that the claimant's additional days of absence were likely due to a continued medical problem. *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1986). 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.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). A claimant must remain available for work on the same basis as when her base period wages were accrued. 871 IAC 24.22(2)f.

A claimant who is under a doctor's restriction to remain off work is not able and available for work; however, a claimant who has been released by her doctor as being able to work is considered able and available for work. 871 IAC 24.23(1), (2), (6), (34), (35); 871 IAC 24.22(1)(a). The claimant has demonstrated that as of October 27, 2011, she is fully released as able to work in some gainful employment. The fact that the employer chose not to allow the claimant to return to her employment when she sought to do so as of October 27 does not alter the fact the she is otherwise able and available for work. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's December 9, 2011 decision (reference 02) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is able to work and available for work effective October 27, 2011. 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

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