IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARBELLA MARTINEZ
Claimant

CARGILL MEAT SOLUTIONS CORP
Employer

APPEAL NO: 14A-UI-13256-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/30/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Cargill Meat Solutions Corporation (employer) appealed a representative's December 15, 2014 decision (reference 01) that concluded Marbella Martinez (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 January 30, 2015. The claimant participated in the hearing. Martha Gutierrez appeared on the employer's behalf. Olga Esparza served as interpreter. 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 February 20, 2013. She worked full time as a worker in the ham bone defatting area of the employer's Ottumwa, Iowa pork processing facility, working on the second shift. Her last day of work was September 11, 2014. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has a nine-point attendance policy. Prior to August 4, 2014, the claimant only had two points, one in January 2014 and one in February 2014, both for absences related to an eye infection or allergy. The employer gave the claimant points for these absences because she did not provide sufficient paperwork to qualify for Family Medical Leave.

The claimant fell at work on August 4, 2014, injuring her back and hip. Her condition got worse, not better, so she sought further medical attention on or about August 9 and was off for at least

some days which the employer considered covered, as the care and absences were covered under the employer's workers' compensation providers. She was told it was an injury to her disc.

The employer's care providers indicated that the claimant was released as able to return to work on August 14, with a restriction of sit down work. The claimant did report that day, but went home early complaining of pain. The employer assessed her a half-point for that early departure. The claimant was then out all of the week of August 18 through August 22, calling in each day. While the employer may have been willing to provide a wheelchair for the claimant once she got to work, the claimant reported that due to the pain she was unable to walk to and from her car or to drive herself to work. The employer assessed her a point for each of those days because it deemed her absences as unexcused because of the release to work effective August 14. She did come into work on August 25, August 26, and August 26 because her husband was able to take off work to drive her to and from work and to carry her to and from her car and to and from the wheelchair. When she came in on August 25 she was given a last chance agreement indicating that she was at nine points, which she declined to sign as she did not agree that the days should be assessed points.

She was again absent on August 27, August 28, September 5, September 8, and September 9, again indicating that she was in too much pain to walk or to drive; her husband was not available those days to carry her or to drive her to work. When she came in for work on September 11 she was informed that she was discharged for excessive absenteeism in violation of the August 25 last chance agreement.

The administrative law judge takes official notice of another representative's decision issued regarding the claimant on January 16, 2015 (reference 02), which allowed the claimant Department Approved Training (DAT) status from November 30, 2014 through February 21, 2015, with possible renewal thereafter.

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. Rule 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. Rule 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. Rule 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. Rule 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. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). The fact that the claimant might have been deemed able to work in a sit down job once she got to work as of August 14 does not mean that her claim of pain causing her to be unable to get to work is not bona fide or that the resulting absences are intentional or unexcused. Because the absences were related to properly reported injury 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.

The claimant has been granted department approved training. She is therefore exempt from the requirements to be able and available for work during the period covered by the DAT decision. However, the employer is not subject to charge for benefits paid to the claimant while she remains in that status. Iowa Code § 96.4-6-a

DECISION:

The representative's December 15, 2014 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 is not subject to charge so long as the claimant remains in DAT status.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs