IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KRISTA M STERRETT BASHIR
Claimant

HARDEE'S FOOD SYSTEMS INC
Employer

APPEAL NO: 06A-UI-08799-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/06/06 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Hardee's Food Systems, Inc. (employer) appealed a representative's August 25, 2006 decision (reference 01) that concluded Krista M. Sterrett-Bashir (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 19, 2006. The claimant participated in the hearing. Tina Chudary appeared on the employer's behalf. 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 there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 15, 2005. Prior to May 25, 2006, she had been working as a shift leader in the employer's Waterloo, Iowa restaurant; as of that date, at her request, she stepped down to work as a cashier part time (approximately 30 hours per week) in the restaurant. Her last day of work was June 20, 2006.

From January 1 through May 31, 2006, the claimant had the following attendance occurrences:

Date	Occurrence/reason if any
01/24/06	.5 hr. late
04/13/06	Absent, no-call, no-show, due to personal issue.
05/17/06	Late, unknown time.
05/26/06	Late, unknown time.
05/27/06	Late, unknown time.

On June 7 the claimant called the employer to report she would be late (unknown time); she failed to call at least two hours prior to the start of her shift as required by the employer. She was verbally warned that this was not acceptable. There were no written warnings given to the claimant.

On June 21 the claimant was scheduled to work from 9:00 a.m. to 4:00 p.m. At about 8:00 a.m., she called Ms. Chudary, the restaurant manager, and reported that she would not be able to work her shift that day because she had just gotten a call from her child's daycare; the daycare told the claimant that they had forgotten to tell the claimant the night before when she picked up her child, who was then a year and two months old, that they had determined the child had thrush, a contagious illness, and that the child could not return to the daycare until she was on medication for at least 24 hours. The claimant asked Ms. Chudary for phone numbers of other employees to see if someone could cover her shift.

There were a couple additional calls between the claimant and Ms. Chudary before 9:00 a.m. in which the claimant reported she had not been able to find a replacement or an alternate sitter; Ms. Chudary had suggested a daughter of another employee, but as the claimant had never met the daughter and knew very little about her, she declined to check on that option. In the final call at approximately 9:00 a.m., the claimant understood Ms. Chudary to say that if she was not at work within 20 minutes, she did not have a job; Ms. Chudary denies she said the claimant definitely would not have a job if she was not there in 20 minutes, but that the claimant "might not" have a job if she was not there.

As the claimant concluded she had no option but to stay home with her sick child, she did not report to work. Believing she therefore did not have a job, she did not seek to return to or contact the employer after that date until June 28 when she went in for her paycheck and brought in her uniforms; nothing was said to her at that time by the employer inquiring as to why the claimant had not reported for scheduled work on and after June 22. The employer asserts that the claimant was not discharged but was determined to have quit by job abandonment by being a no-call, no-show for scheduled work on June 22, June 25, and June 26.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer asserted that the claimant was not discharged but that she quit by job abandonment. The administrative law judge concludes that the claimant's interpretation on June 21 that she "did not" have a job if she did not come in to work that day was reasonable. If the employer had not intended that outcome, the employer was better posed to clarify the intent of the ambiguous statement (that the claimant "might not" have a job) if in fact the employer was not discharging the claimant; particularly when the employer realized that the claimant had not reported to work on June 22, the employer was in a position to realize that it needed to make clear its intent as to the claimant's employment status. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The reason the employer effectively discharged the claimant was her attendance. Generally, absenteeism arising out of matters of purely personal responsibility such as childcare is not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). However, a final absence due to the inability to obtain care for a sick infant or small child has been held to not be misconduct, even where excessive. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991). In this case, the absence was due to the illness of a small child. The employer further asserts that the reason for the final absence was not properly reported. However, it is clear that the claimant's failure to report her lack of childcare for her sick child by two hours prior to the start of her shift was not volitional; nor was her decision not to leave her sick child with an unknown daughter of another employee unreasonable or inexcusable.

Because the final absence was due to a reasonable ground, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. 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.

DECISION:

The representative's August 25, 2006 decision (reference 01) is affirmed. The claimant did not voluntarily quit and 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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