IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KELLIE R CONNER
Claimant

US POSTAL SERVICE
Employer

APPEAL NO: 10A-UCFE-00048-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/03/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

U.S. Postal Service (employer) appealed a representative's November 10, 2010 decision (reference 01) that concluded Kellie R. Conner (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 February 7, 2011. The claimant participated in the hearing and was represented by Rand Kruger, union representative. Bobette Anderson appeared on the employer's behalf and presented testimony from one other witness, Jim Herrmann. 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 or about June 10, 2005. She worked full time as a mail handler at the employer's Des Moines truck terminal. Her last day of work was September 29, 2010. She was escorted from the building that day, and sent a letter of removal on October 6. The reason asserted for the separation was violation of a last chance agreement regarding attendance.

The claimant had been given an initial last chance agreement in July 2009, and a restated last chance agreement in August 2009. Under the terms of the agreement, the claimant could have no more than three days (24 hours) of absence which was not covered by some form of approved leave.

In the next year the claimant had a number of occurrences that were not covered by some form of approved leave allowed by the agreement. On or about September 14, 2010 postal inspectors made a report to one of the managers at the terminal that two days the claimant had previously claimed as FMLA, a form of approved leave, were actually due to the claimant being in jail those days, May 19 and July 28. The claimant acknowledged that she had gone to jail

both of those days, asserted that on both occasions she was not arrested and put into jail until after she had called in to claim FMLA. On the first occasion she had been made aware that officers were looking for her, and so went to her attorney's office, who escorted her to turn herself in. She did not initially know that she would be jailed, but the stress of the situation triggered problems with her underlying medical condition, so she knew she would not be able to work, and as a result, did call in. On July 28 the claimant testified that she had already called in her absence due to her condition, had driven to the grocery store to get some food for her children, and had been stopped, arrested, and taken to jail for driving while barred.

The employer indicated that a comparison of court records with the employer's call in records indicates that the claimant's call-ins came after the time of the jail bookings. There was no information available regarding the accuracy of either source of information.

The claimant called in absences on September 22, September 23, and September 24. September 22 was indicated as due to illness of her dependents, for which FMLA was sought, and September 24 was indicated as due to personal illness due to her underlying condition covered by FMLA. It is unclear whether September 23 was indicated as due to dependent illness, personal illness, or a combination of the two. The employer asserts that the claimant only sought FMLA coverage for two hours, so that the remaining six hours would not be covered by some form of approved leave. The claimant asserts that she had sought to have all eight hours covered by FMLA.

With the six hours treated as unexcused on September 23, plus the absences on May 19 and July 28, the employer concluded that the claimant had absences over six days and of about 28 hours, in excess of that allowed by the last chance agreement. As a result, the employer determined to remove the claimant from employment.

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. 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. 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 violation of her last chance agreement for attendance. First, to the extent that the employer relies on the May 19 and July 28 occurrences, including the aspect of the claimant's separation that she took these days as FMLA under false pretences, these cannot be relied upon to establish a current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incidents in question occurred months prior to the employer's discharge of the claimant, and there were postal inspectors, agents of the employer, involved and aware of the incidents at the time of the incidents. Further, as to the impact of these days on the total amount of time the claimant was allowed to miss "unexcused" under the terms of the last chance agreement, while the claimant was questioned about those occurrences prior to September 22, she was not advised that the employer had made a determination that those two incidents were going to be included in the allowable "non-covered" leave under her last chance agreement, so that she was at least approaching the maximum.

Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984); 871 IAC 24.32(7). The final incident the employer asserts pushed the claimant past her maximum "unexcused" hours were the six hours on September 23. As she had not been told the days of May 19 and July 28 were in fact going to be counted as "unexcused," she was not aware at the time that the September 23 occurrence would put her over the maximum allowance.

Further, 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 or an agreement between the parties. 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 impose discipline up to or including discharge for the absence under its attendance policy or agreement. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Regardless of whether or not the six hours on September 23 were covered by FMLA, it is clear that they claimed to be due to illness. Because the final absence was related to properly reported 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.

DECISION:

The representative's November 10, 2010 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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