

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMIE L FISTER
Claimant

APPEAL NO: 15A-UI-07134-LDT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/15/14

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jamie L. Fister (claimant) appealed a representative's June 12, 2015 decision (reference 04) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 28, 2015. This appeal was consolidated for hearing with one related appeal, 15A-UI-07135-LDT. The claimant participated in the hearing. Ajah Anderson of Corporate Cost Control appeared on the employer's behalf and presented testimony from one Witness, Dale Mitchell. Two other Witnesses, Austin Bryant and Megan Ruden, were available on behalf of the employer but did not testify. 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:

Reversed. Benefits allowed if otherwise eligible.

FINDINGS OF FACT:

The claimant started working for the employer on October 6, 2013. She worked part time (30 -32 hours per week) as a kitchen clerk in the employer's Webster City, Iowa store. Her last day of work was October 6, 2014. She advised the employer on that date that she needed to be off work for an indefinite period of time due to a medical issue. The employer agreed that she could be off work, but that she should let the employer know when she again became available for work. There were no requirements placed on her as to how frequently she would otherwise need to check in with the employer. She did informally keep the employer advised as to her status, usually through contact with her kitchen manager, such as advising him in December 2014 that she would have back surgery in February 2015, and indicating to him in late March or early April 2015 that she was still recovering.

The employer attempted to contact her in late April or early May to inquire as to her status, but was unable to reach her as the kitchen manager had not passed on to the employer the claimant's change in phone number. Because the claimant had been off work for so long, the employer discharged as an active employer on or about May 1, 2015.

On or about mid-May the claimant spoke with the store management on a couple of occasions. She inquired as to whether there would be hours for her when she was released by her doctor, and was told there would be, but that she would need to go through the process of reapplying. The claimant's doctor released the claimant only to go for rehabilitation in about mid-May; as of the date of the hearing in this matter, the claimant's doctor has not released the claimant as able to return to any work.

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). Because the claimant's absence, even though extensive, 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 as a result of the separation.

DECISION:

The representative's June 12, 2015 decision (reference 04) 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/mak