

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HONEST CHET
Claimant

APPEAL NO: 15A-UI-02135-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HEALTH SERVICES – IOWA CORP
Employer

OC: 01/25/15

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Mercy Health Services – Iowa Corporation (employer) appealed a representative's February 11, 2015 (reference 01) decision that concluded Honest Chet (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 April 15, 2015. The claimant participated in the hearing. Beckie Wahlbert appeared on the employer's behalf and presented testimony from one other witness, Lori Bourassa. 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 September 10, 2007. She worked part time (32 hours per week) as a certified nursing aide (CNA) in the employer's inpatient behavioral health unit. Her last day of work was January 26, 2015. The employer discharged her on January 29, 2015. The reason asserted for the discharge was excessive absenteeism.

The employer had given the claimant a final warning for attendance on May 12, 2014. Since then, and prior to January 29, 2015, she had four absences which were reported as due to illness, two no-call/no-shows, which may also have been due to illness, and four tardies. The most recent event prior to January 29 was a tardy on December 18, possibly due to weather. The employer did not provide the claimant with any further warning regarding her attendance after May 12, 2014.

On January 29 the claimant called in a half-hour after her scheduled start time of 6:00 a.m. to report she would not be in due to illness, rather than two hours in advance as expected by the employer. The claimant had been having some sleep disorder issues for which she had sought medical attention in the past, although she was not currently receiving treatment. While she went to bed by 11:00 p.m., she slept poorly the night of January 28 into January 29, only falling asleep around 4:00 a.m. She then did not awaken until about 6:15 a.m., at which point she felt unable to function properly in order to work. She therefore called in to report her absence. As a result of this late call in, after the prior warning on attendance in May 2014, the employer discharged the claimant.

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). In this case, the final absence was not properly reported. However, it is clear that the claimant's failure to report her absence before the start of her shift also was not volitional, as the illness itself prevented her from calling in advance. 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 February 11, 2015 (reference 01) decision 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/can