IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KAYCEE M PLOESSL
Claimant

FOCUS SERVICES LLC
Employer

APPEAL NO: 12A-UI-11583-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/26/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Focus Services, L.L.C. (employer) appealed a representative's September 21, 2012 decision (reference 01) that concluded Kaycee M. Ploessl (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 October 23, 2012. The claimant participated in the hearing. Kelly Lechnir appeared on the employer's behalf. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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 16, 2012. She worked part time (about 30 hours per week) as an agent in the employer's Dubuque, Iowa call center. Her last day of work was August 23, 2012. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer discharges employees who have five attendance occurrences in a 30-day period. The employer asserted that the claimant had attendance occurrences on August 1, August 2, August 3, and August 16, and that after the August 16 occurrence she was issued a final written warning to inform her she was at four points. The employer could not establish that this final written notice was actually given to the claimant prior to August 23, and the claimant denied that she was informed she was at the final warning level until she was discharged on August 23.

The final attendance occurrence was on August 23. In approximately early July the claimant was diagnosed with having an anxiety disorder which resulted in her suffering from panic attacks; there was an incident in early July in which the claimant was taken from the call center by ambulance to the hospital due to suffering a panic attack. Prior to reporting for work at 10:00 a.m. on August 23, the claimant had a family issue arise that could have served as a stressor to trigger a panic attack. She worked for about an hour, during which her performance began to suffer as a panic attack set in. Her supervisor indicated that because the claimant's condition was affecting her job performance, she should go and speak to the site director, which the claimant did at about 11:00 a.m. She indicated to the site director that she was starting to have a panic attack, that she would go into the restroom and try to get herself under control, but that otherwise she might have to leave work. She then did attempt to get herself under control, but about 45 minutes later she returned to the site director and reported that she was unsuccessful in bringing the panic attack under control and that she would need to leave. The site director then informed the claimant that she was being discharged for having too many attendance occurrences. The claimant then left; she reported her panic attack to her doctor's office as she left the employer's facility.

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).

Excessive unexcused absenteeism can constitute misconduct. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). The claimant testified that her final occurrence on August 23 was due to a bona fide medical situation, the panic attack. The employer relies exclusively on the second-hand account from the site director to assert that the claimant was not having a panic attack, but that her reason for leaving was only because of "family problems." However, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the site director might have been mistaken, whether she actually carefully observed the claimant or whether she might have misinterpreted or misunderstood the claimant's explanation, or whether she is credible. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant's reason for leaving work on August 23 was other than due to the claimant's medical condition.

Because the final attendance incident 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. Further, in order to establish the necessary element of intent for misconduct to be established, 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). The claimant had not been effectively warned prior to August 23 that her job was in jeopardy. 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 September 21, 2012 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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