IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VALERIE M GRIEGO
Claimant

GRANDVIEW HEIGHTS INC
Employer

APPEAL NO: 11A-UI-16129-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Valerie M. Griego (claimant) appealed a representative's December 8, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Grandview Heights, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 9, 2012. The claimant participated in the hearing. Chris Wolf appeared on the employer's behalf and presented testimony from one other witness, Joey Oxenfield. 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.

FINDINGS OF FACT:

The claimant started working for the employer on March 14, 2011. She worked part-time as a certified nursing aide (CNA) in the employer's long-term care nursing facility. Her last day of work was November 13, 2011. The employer discharged her on November 17, 2011. The reason asserted for the discharge was excessive absenteeism.

The claimant had numerous instances of absences, tardiness, and leaving early during her employment, including five days of absence due to illness of a sick child (one two-year-old and one eleven-month-old) and two days counted as one for personal illness, for which she received a total of 18 points. Three points for tardies or leaving early because of a sick child or personal illness brought her to 21 points as of August 22, at which point she was given a three-day suspension and a final warning.

On November 13 the claimant was scheduled to work a shift beginning at 10:00 p.m. Shortly before she was to leave for work, leaving her two young children with her 16-year-old stepdaughter, the stepdaughter showed her a nude picture of herself on her phone which she had sent to her boyfriend at his request. She further told the claimant that the boyfriend had requested that she take and send a picture of the claimant's two-year-old child doing something of a sexual nature with the stepdaughter. The claimant became frantic and was afraid to leave her young children in the care of the stepdaughter, but was unable to find anyone else on short notice to care for her children, and so went to work. However, upon her arrival, she was distraught and distressed. She called the director of nursing, Oxenfield, who agreed that in the claimant's current state, she was unable to work. She told the claimant to tell the charge nurse that she was sending the claimant home because she was unable to work; she further indicated they would talk further later as to what this might mean to the claimant's employment status. When there was further discussion on November 17, the employer discharged the claimant because of her failure to work her shift on November 13 after the prior incidents and final warning.

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 that 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 that 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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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). 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, many of the prior absences had been due to the illness of a small child, as well as due to the claimant's own illness, so excessive unexcused absenteeism has not been established. Further, because the final absence was due to a reasonable ground for which the employer agreed that the claimant was unable to work, no final or current incident of unexcused absenteeism occurred that establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. While the employer may have had a good business reason for discharging the claimant, her actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 8, 2011 decision (reference 01) 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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