IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARY S THOMAS
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 10A-UI-13778-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/08/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Mary S. Thomas (claimant) appealed a representative's September 29, 2010 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Care Initiatives. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 9, 2010. The claimant participated in the hearing. Tom Kuiper of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Donna Kerns and Jeanie Fletchall. During the hearing, Employer's Exhibit One was entered into evidence. 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 May 9, 2007. She worked full time as a certified nursing aide (CNA) in the employer's Lamoni, Iowa facility. Her last day of work was July 21, 2010. The employer discharged her on or about August 9, 2010. The reason asserted for the discharge was excessive absenteeism.

Between January 1 and July 21, 2010 the claimant had been absent ten days, all due to illness which she called in and reported. She had not received an attendance warning. On July 22 she was absent due to illness, which was properly called in and reported. Again on July 24 she was absent due to illness, which was properly called in and reported. She had a discussion with the employer on July 30 regarding the fact that she might have some further absences, the employer's desire that she provide doctor's notes by August 2, and the need for her to submit FMLA (Family Medical Leave) paperwork; she was told she had until August 15 to provide that paperwork. She then properly called in absences due to illness for both August 2 and August 3; specifically on August 3 she reported she had been suffering chest pains, and had gone to the hospital for tests. While the employer had some suspicions that the claimant's absences were due to something other than true illness, it had no specific evidence to that end. On about

August 9 the employer determined that she had missed too much work and since she had not provided doctor's notes or FMLA paperwork, it determined to discharge her.

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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). It is the employer's burden to establish that a claimed absence is unexcused. 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)(doctor's note to cover absence not necessary for an absence claimed as due to illness to be "excused.") The claimant did not have prior excessive absences which were established by the employer to be unexcused.

The employer treated the claimant's final absences as unexcused because she did not provide a doctor's note and did not provide FMLA paperwork. However, an absence for illness is not only treated excused for purposes of unemployment insurance eligibly if it is covered by a doctor's note or FMLA. The FMLA provisions in particular were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. Because the final absences were not shown to be related to be other than the properly reported illness as claimed by claimant, 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 September 29, 2010 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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