

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIA R GUTIERREZ
Claimant

APPEAL NO: 13A-UI-03533-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

OC: 02/24/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Maria R. Gutierrez (claimant) appealed a representative's March 21, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after an at least temporary separation from employment with Kelly Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 26, 2013. The claimant participated in the hearing. Julie Countryman appeared on the employer's behalf. Ike Rocha served as interpreter. 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 employer is a temporary employment firm. The claimant originally began taking assignments with the employer in February 2011. She worked on an assignment at that time for the employer's Davenport, Iowa business client; that assignment ended in October 2011. She returned to working on a new assignment with that same business client on January 3, 2012. She worked full time as a parts stocker. Her last day on the assignment was February 21, 2013. The assignment ended because the business client determined to end it due to the claimant's attendance.

The claimant had been given a first warning for attendance in August 2012, and had been given a follow-up written warning for attendance on February 15, 2013. In 2012 the claimant had missed about ten days, of which about five were for illness and about five were for personal reasons; she had also missed about seven partial days, of which three were for illness or family emergency, three were for personal reasons, and one was unknown. Between January 4 and

February 19, 2013, the claimant had already missed eight days, all due to illness. Under the business client's attendance standards, a third warning for attendance would result in discharge.

The claimant left work early on February 21, 2013 due to illness. She then called in an absence due to illness on February 22. The claimant was experiencing asthma attacks, apparently aggravated by the fact that she was pregnant. She sought medical attention on these days, and on February 22 obtained a note excusing her from work until February 27. Before the claimant had a chance to turn the note into the employer, the business client determined to end the claimant's assignment; Countryman, the employer's on-site supervisor, called the claimant later on February 22 to inform her that the assignment was ended. At that time the claimant sought to relay the information to the employer about the doctor's note, but was told it did not matter.

Despite not having any medical documentation specifying that the claimant was not able to work other than the temporary period through February 26, the employer informed the claimant that it would consider the claimant for reassignment elsewhere "when she was better." The claimant understood this to mean that the employer would be calling her if there was any other work available on or after February 27; the employer appears to be waiting for some other unspecified information beyond the doctor's note to indicate that the claimant was "better." No other evidence has been presented to sufficiently raise the question as to whether the claimant has not been able and available for work as of February 27.

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 and 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). Because the final absence 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.

DECISION:

The representative's March 21, 2013 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs