IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BERGEN M ANDREW
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 12A-UI-11086-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/04/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Bergen M. Andrew (employer) appealed a representative's September 4, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Care Initiatives (claimant). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 9, 2012. The claimant participated in the hearing and presented testimony from one other witness, Deanna Andrew. David Williams of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Julie Wesself. 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 December 16, 2009, then working at the employer's Knoxville, Iowa location. As of January 25, 2011 she worked full time as a certified nursing aide (CNA) at the employer's Pleasant Hill, Iowa long-term care nursing facility. Her last day of work was a double shift from the night of August 5 to the morning of August 6, 2012. The employer discharged her on August 13, 2012. The reason asserted for the discharge was being a no-call, no-show for work.

After getting of work at 6:00 a.m. on August 6 the claimant received a call at about 2:00 p.m. indicating that her father who was in Oklahoma had suffered a heart attack and was in the hospital. She gathered some items and got on a bus to go to Oklahoma at about 6:00 p.m. that night. However, she forgot her cell phone, and did not have the employer's phone numbers with her, nor easy access to a means of getting the phone numbers.

The claimant was next supposed to work on August 8 at 6:00 a.m., then on August 9 at 2:00 p.m., then on August 10 at 6:00 a.m. She was a no-call, no-show for these shifts. The employer has a policy under which two days of no-call, no-show results in discharge.

The claimant did not leave Oklahoma to return to Iowa until about 6:00 p.m. on August 9, and did not reach Iowa until about 10:00 a.m. on August 10. That afternoon of August 10, having retrieved her phone, she sent a text message to Wesself, the director of nursing, indicating she was sorry she had been absent but that she had had a family emergency in Oklahoma and had left her phone. When she did not receive a response, on August 13 she called Wesself and was informed that her employment was terminated.

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 or other reasonable grounds 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). In this case, the final absences were not properly reported. However, it is clear that the claimant's failure to report her absences were not volitional. Therefore, 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.

In this case a comparison to treating this separation as a quit is also helpful. A three-day no-call, no-show in violation of company rule can be considered to be a voluntary quit. 871 IAC 24.25(4). However, where that quit is then shown to be for "compelling personal reasons" and the period of absence did not exceed ten working days, after which the employer declined to allow the employee to return to employment, the separation is treated as a voluntary quit attributable to the employer. 871 IAC 24.25(20); Iowa Code § 96.5-1-c. In this case, if the separation was treated as a voluntary quit the claimant would have satisfied these provisions. The outcome should not be different if the separation is treated a discharge. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's September 4, 2012 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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