

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAWN S CARDA
Claimant

APPEAL NO: 11A-UI-16139-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HEALTH SERVICES – IOWA CORP
Employer

OC: 11/20/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Dawn S. Carda (claimant) appealed a representative's December 15, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Mercy Health Services – Iowa Corp. (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 and was represented by Daniel Shuck, attorney at law. The employer received the hearing notice and responded by calling the Appeals Section on January 4, 2012. The employer indicated that Beckie Walberg would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, Ms. Wahlberg was not available; therefore, the employer did not participate in the hearing. During the hearing, Claimant's Exhibits One through Seven were entered into evidence. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on or about December 4, 2010. She worked full-time as a phlebotomist and laboratory technician. Her last day of work was April 18, 2011.

The employer discharged her on April 29, 2011. The reason asserted for the discharge was excessive absenteeism.

The claimant had missed about two days prior to February 2011 due to her seven-year-old child being sick, and had been late about five times. She had missed two days due to personal illness. Her significant absences began as of February 22, 2011, when she was injured in a car accident. As a result of those injuries, she was kept off work through April 3, 2011. On April 18 she had a fall at home and aggravated her prior injuries, so her doctor instructed her to remain off work indefinitely. She communicated those doctor's instructions to the employer. However, before the claimant recovered and was able to return to work, on April 21 the employer informed the claimant that she was being discharged due to her absences from work during her probationary period.

The claimant continued to be under her doctor's instructions to remain off work until she was released with no further restrictions as of November 18, 2011. She did not believe the employer would rehire her, so she did not reapply for employment with the employer.

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). Because the final absence was related to properly reported illness or other reasonable grounds, 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. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

Since the claimant was discharged and did not quit, the provisions of Iowa Code § 96. 5-1-d and 871 IAC 24.25(35) that require an employee who has quit for a non-work-related illness or injury to seek to return to employment with the prior employer does not apply. There is also no requirement under the provisions of law relating to being able and available for work that require a former employee to seek to return to work with a prior employer in order to be able and available for work. The claimant has demonstrated that she has now been released for work in some gainful employment, not necessarily with the former employer. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's December 15, 2011 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is able and available for work as of November 18, 2011. 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/kjw