IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KAYLA D MALONE
Claimant

BC'S TRUCK PLAZA INC
Employer

APPEAL NO. 07A-UI-06824-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/17/07 R: 01
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kayla D. Malone (claimant) appealed a representative's July 3, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with BC's Truck Plaza, Inc./AmPride Truck Plaza (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 30, 2007. The claimant participated in the hearing. Cindy Borkowski appeared on the employer's behalf. 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 June 29, 2006. She worked as a waitress (approximately 30 – 32 hours per week) in the restaurant at the employer's truck plaza. Her last day of work was June 18, 2007. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The claimant had most recently been absent on June 17. She had been scheduled for an 8:00 a.m. shift, and had called at approximately 6:30 a.m. to indicate that her babysitter for her six-month old child had called at 4:30 a.m. to report she could not baby-sit and that the claimant had been unable to find anyone else who was available to baby-sit that day, and so she would not be able to work.

The claimant had previously been absent on April 8, 2007; she had called the restaurant manager the night prior to report that she had taken her child to the hospital, indicating she might not be at work the next day. The employer showed the claimant as being a no-call/no-show for work on May 13; however, the claimant denied being scheduled to work that day, indicating that if she had been scheduled, she had previously switched with someone else. On May 27, the claimant called prior to her 8:00 a.m. start to report she would be late due to her

child's illness; she reported 45 minutes late and then left after approximately 30 minutes because of continued problems with her child being given medication. She had reported when she left that if her child continued to have problems being given the medication, she might have to return with her child to the doctor. She did not return for the remainder of her shift that day. The employer shows the claimant as being absent on May 29; however, the claimant asserted that she in fact did report and work her shift that day.

The employer has no record of any attendance warnings being given to the claimant. The claimant acknowledged that the restaurant manager had general discussions with her about making "good choices" in her life, but there had been no specific discussion regarding her attendance or that her job was in jeopardy.

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).

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination. Higgins, supra. 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 July 3, 2007 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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