

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BYRON G FIRST
Claimant

APPEAL NO: 11A-UI-12516-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY MEDICAL CENTER
Employer

OC: 08/21/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Byron G. First (claimant) appealed a representative's September 14, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Mercy Medical Center (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 29, 2011. The claimant participated in the hearing and was represented by A.J. Thomas, Attorney at Law. The employer failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 11, 2010. He worked part time (25 - 40 hours per week) as a cook. His last day of work was August 22, 2011. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The claimant had been scheduled to work a shift on August 21 from 9:30 a.m. to 6:00 p.m. At about 1:00 a.m. he called and reported to the manager on duty that he would be absent from that shift. The reason for the absence was a family emergency; a line beneath his adult son's trailer home had burst and the home was flooded, an event which had just been discovered at about 12:30 a.m., so the claimant went to assist his son.

The claimant had previously missed about seven other days of work in 2011 which were all due to either illness, such as a respiratory ailment, or due to being ill in reaction to a change in medications. He also went home early about two partial days, also due to illness. In 2010 he had missed at least four days, but all days missed in 2010 were also due to illness. He had always called in to properly report his absences.

He had been given a warning for his attendance in February or March 2011, but was not informed that his job was approaching the termination level. Had he been aware on August 21 that an additional absence would have resulted in his discharge, he would have made some other arrangement for his son so he would not have missed work that day.

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). While the final incident itself was not due to the claimant's illness, it was for another reasonable ground, so no final or current incident of unexcused absenteeism occurred. Further, even if the final absence is treated as unexcused, the employer has not established that the claimant did have excessive unexcused absence prior to the final occurrence. Finally, 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 his job, and the employer has failed to establish that the claimant was properly warned so as to place him on notice of the jeopardy an additional absence would present. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). 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 14, 2011 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 he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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