

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NIKI L GRAVES
Claimant

APPEAL NO: 11A-UI-02359-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

**OC: 01/16/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Good Samaritan Society, Inc. (employer) appealed a representative's February 16, 2011 decision (reference 02) that concluded Niki L. Graves (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 12, 2011. This appeal was consolidated for hearing with one related appeal, 11A-UI-02358-DT. The claimant participated in the hearing. Laurie Welch appeared on the employer's behalf. Layne Gross was present as an observer. 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 July 16, 2009. She worked full time as a certified nursing aide (CNA) in the employer's Indianola, Iowa long-term care and skilled nursing facility, working on the evening shift from 2:15 p.m. to 10:45 p.m. Her last day of work was January 14, 2011. The employer discharged her on January 18, 2011. The reason asserted for the discharge was excessive absenteeism.

In 2010 the claimant had incurred 26 absences and two tardies. Thirteen of the absences were reported as due to illness, for which the claimant turned in between two and five doctor's excuses.¹ As a result of these absences, the employer gave the claimant a final warning on October 18. The employer indicated that if the claimant provided doctor's notes for any absences, it would be better able to treat those absences as excused under the employer's attendance policies.

¹ It does not affect the outcome of this case even if the employer received only two of the notes versus the five the claimant indicated she provided.

The claimant worked one day on January 2011, January 14. She had called in absences due to several different medical problems on January 4, January 5, January 6, January 8, January 9, January 10, January 11, and January 13; one of those days, January 9, she had been hospitalized due to dehydration. Most of the claimant's medical problems in January were due to being in the first trimester of pregnancy. The claimant indicated that she could get a doctor's note for the absences. However, when she did return to work on the one day, January 14, she had forgotten to get a note when she saw her doctor on January 13, and the doctor's office was closed by the time on January 14 she realized she had neglected to obtain the note. She did subsequently obtain a note for those days. However, the next day she was scheduled to work was January 17, on which day she again called in an absence, indicating that she was having some bleeding and was going back to her doctor. She did obtain a note from her doctor that day. However, before the claimant had an opportunity to return to work on January 18 with the note for January 17 as well as the note for the prior days in January, the employer determined to discharge the claimant for her absences. The claimant was informed of that decision by phone on the morning of January 18.

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).

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 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). Neither is it required that an absence due to a medical condition be evidenced by a doctor's excuse in order to be treated as excused for purposes of determining unemployment insurance benefit eligibility. Gaborit, supra. 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 February 16, 2011 decision (reference 02) is affirmed. 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

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