

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WANITA J MCNABB
Claimant

APPEAL NO: 10A-UI-07070-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRIORITY COURIER INC
Employer

OC: 04/11/10

Claimant: Respondent (1/R)

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

STATEMENT OF THE CASE:

Priority Courier, Inc. (employer) appealed a representative's May 11, 2010 decision (reference 01) that concluded Wanita J. McNabb (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 July 1, 2010. The claimant participated in the hearing. Don Watters 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on February 5, 2009. She worked full time as a customer service representative/billing clerk at the Cedar Rapids, Iowa terminal of the employer's delivery business. Her last day of work was March 19, 2010. The employer discharged her on April 1, 2010. The reason asserted for the discharge was absenteeism.

The claimant left work early on March 19 as she was ill and in pain. She sought medical treatment, and learned that she had kidney stones. Her doctor instructed her to stay off work until she passed the stones. The claimant faxed in the doctor's note to the employer. During the week of March 22 the claimant was sufficiently under medication that she was unable to communicate with the employer, but her husband called in to the employer each day to confirm that she was still unable to report for work. The week of March 29 the claimant's medication had been adjusted, and she called in to the employer each day to confirm that she was still unable to report for work. On April 1 the terminal manager discharged the claimant for her absence.

Subsequent to the discharge, the business president, Mr. Watters, learned of the claimant's discharge. He investigated and concluded that the terminal manager had been wrong to discharge the claimant. He discharged the terminal manager. On April 6 he spoke with the claimant and offered to reinstate her to her job. At that time the claimant had still not yet passed the kidney stones. She was uncertain as to whether she wished to return to the position, as she had heard reports that attitudes in the office were negative towards her and that she was being blamed for the terminal manager being discharged.

The claimant passed the kidney stones on or about April 11. Her doctor indicated she could return to work anytime thereafter. The claimant established an unemployment insurance benefit year effective April 11, 2010. It is unclear if there was further discussion between the claimant and Mr. Watters regarding his offer of reinstatement after the claimant established her claim for unemployment insurance benefits.

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 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 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.

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. A person who is under doctor's restriction against working is not able and available for work and not eligible for unemployment insurance benefits. 871 IAC 24.23(1), (35). However, a doctor's statement that a person is able to return to work is generally sufficient unless rebutted with substantial other evidence to establish that the person is able and available for work and eligible for unemployment insurance benefits. 871 IAC 24.22(1)a. The claimant was not medically able to work prior to April 11, but she was not seeking benefits prior to that date. As of April 11 she was medically able to return to work, and is eligible for unemployment insurance benefits if she was otherwise eligible.

An issue as to whether the claimant refused a suitable offer of work without good cause during a time in which she had an active claim for unemployment insurance benefits arose during the hearing. Iowa Code § 96.5-3-a; 871 IAC 24.24(8). This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's May 11, 2010 decision (reference 01) 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

ld/pjs