

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIA A ELLIOTT
Claimant

APPEAL NO: 08A-UI-05390-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BEAR BASICS CHILDREN CENTER INC
Employer

OC: 04/27/08 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Bear Basics Children Center, Inc. (employer) appealed a representative's May 30, 2008 decision (reference 02) that concluded Maria A. Elliott (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 June 23, 2008. The claimant participated in the hearing and presented testimony from one other witness, Daniel Elliott. Betty Bolin appeared on the employer's behalf. During the hearing, Claimant's Exhibit A was entered into evidence. 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 October 16, 2007. She worked full time as an assistant teacher in the employer's daycare center. Her regular schedule was to work from 8:00 a.m. to 4:30 p.m., Monday through Friday. Her last day of work was April 24, 2008. The employer discharged her on April 25, 2008. The reason asserted for the discharge was excessive absenteeism.

Prior to April 24 the claimant had left early approximately 17 days, was absent about six days, was gone for about 3.5 hours for a doctor's appointment one day, and was about an hour and a half late one day. The incidents were virtually all due to health or medical issues. The employer had not given the claimant any written warnings for her absenteeism, but about a week prior to April 25 Ms. Bolin, the center's director, had verbally reprimanded the claimant for missing so much work.

At approximately 7:00 p.m. on the evening of April 24 the claimant took her fiancé to the emergency room; he was not seen by a doctor until nearly 12:00 a.m., but he was ultimately diagnosed with appendicitis. He was not assigned to a hospital room until about 2:00 a.m. The

claimant stayed with him throughout the night, and on the morning of April 25 he was scheduled for surgery, which occurred on the afternoon of April 25. At approximately 7:00 a.m. the claimant called the employer from the hospital to report that she had been and was at the hospital due to her fiancé's situation, that she needed to stay with him, and that she therefore would not be in to work that day.

When the claimant sought to return to work on April 28, she was informed she was no longer needed.

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 excusable reasons cannot constitute work-connected misconduct since they are not volitional, even if the reason for the absence is not deemed excused under the employer's attendance policy and 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 a reasonable justification, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Even though the employer may have had a good business reason for determining to discharge the claimant, it 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 May 30, 2008 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

ld/pjs