

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYNTHIA M MILLER
Claimant

APPEAL NO: 12A-UI-07451-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED STATES CELLULAR CORP
Employer

OC: 05/27/12
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Cynthia M. Miller (claimant) appealed a representative's June 14, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with United States Cellular Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 16, 2012. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by sending a statement to the Appeals Section indicating that the employer was not going to 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on February 18, 2008. She worked full-time as a customer service representative at the employer's Marion, Iowa, call center. Her last day of work was February 20, 2012. As of February 21, 2012, upon the advice of her doctor, she went on short-term disability (STD) and FMLA (Family Medical Leave). The FMLA expired on or about May 7, 2012. Through her doctor, the claimant applied for an extension at least of the STD; she was advised by her doctor on or about May 7 that he anticipated a release to work effective June 4.

On May 22 the employer determined to deny the claimant's request for an extension of the STD. A letter was prepared and sent to her that day to that effect. While she did not receive the letter until May 26, she had verbally been made aware of the letter on or about May 23. She spoke to her immediate supervisor on May 23 and informed the supervisor that she did have a release

dated May 22 which would allow her to return to work on June 4; however, the supervisor responded that if she did not return to work within 48 hours, she would no longer have a job. The claimant was unable to contact her doctor to see if the release date could be advanced due to the approaching holiday weekend. The letter the claimant received on May 26 indicated that the claimant had five days from the receipt of the letter to return to work; however, on May 29 the immediate supervisor called the claimant and informed her that the employment was ended. The administrative law judge surmises that the reason for the discharge was excessive absenteeism.

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 that 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 or on whether FMLA or STD applies to the absence. 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). Here, the employer knew or should have known that the claimant would be absent for an extended period of time. *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1986). Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred that 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.

An issue as to whether the claimant was able and available for work for the benefit week ending June 2 arose during the hearing. 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 June 14, 2012 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. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw