IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

COLLEEN M STANERSON
Claimant

PRIDE OF IOWA SANDWICHES INC
Employer

APPEAL NO: 08A-UI-01095-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/06/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Colleen M. Stanerson (claimant) appealed a representative's January 23, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Pride of Iowa Sandwiches, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 14, 2008. The claimant participated in the hearing and presented testimony from one other witness, Rachel Waldrop. Heather Corpus appeared on the employer's behalf and presented testimony from one other witness, Angela Layman. 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 April 16, 2007. She worked full time as a sandwich maker in the employer's vending sandwich preparation and distribution business. Her last day of work was January 4, 2008. The employer discharged her on January 7, 2008. The reason asserted for the discharge was absenteeism.

The employer has a 95 percent attendance expectation. Employees who do not meet this standard are not eligible for holiday pay. The claimant had nine absences in 2007 due to sickness and court appearances and therefore been below the 95 percent standard toward the end of 2007 but was given direction as to how she could get her percentage back to 95 percent to qualify for the holiday pay and did so. She was also absent due to illness on January 3, 2008. However, she had never been given any disciplinary action to indicate that her job was in jeopardy should she miss additional work.

The claimant's shift was to start at 6:00 a.m. On January 4, 2008 the claimant attempted to call her supervisor, Angela Layman, at approximately 5:45 a.m. and again at 5:55 a.m. to report that she would be again absent due to illness. However, she was unable to reach Ms. Layman.

At about 5:50 a.m., she called her coworker with whom she rode to work, Ms. Waldrop, who also lived in a different structure on the same property as the claimant. The claimant informed Ms. Waldrop that she was not going to go to work that day as she was sick and that she had attempted to call Ms. Layman but was unable to reach her, so asked Ms. Waldrop to inform Ms. Layman of the claimant's absence due to illness when she arrived at work. Ms. Waldrop did so. However, the employer determined to treat the claimant's absence as a no-call/no-show, and then determined to discharge her.

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).

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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. Cosper, supra. However, employer asserts that the illness-related absence in this matter was not properly reported. In this case, it is clear that the claimant's failure to report her absence before the start of her shift was not volitional, as Ms. Layman was not available, and the claimant took the next best alternative available to her. Further, 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 her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination. Because the final absence was related to reasonably 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 January 23, 2008 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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