IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GAYLE SANER
Claimant

MARKETLINK INC
Employer

APPEAL NO: 10A-UI-10823-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/09/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

MarketLink, Inc. (employer) appealed a representative's July 29, 2010 decision (reference 01) that concluded Gayle Saner (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 October 19, 2010. The claimant participated in the hearing. Amy Potratz 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? Is the employer's account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on April 22, 2010. She worked full time as sales representative in the employer's telemarketing call center. Her last day of work was on or about June 8, 2010. The employer discharged her on June 11, 2010. The reason asserted for the discharge was her attendance.

The claimant had been late a day in early May and had therefore incurred a half point under the employer's attendance policy. She had also called in sick on May 4 and on May 11, incurring one point for each day. She was then laid off for several weeks, returning on or about May 27, 2010. However, during the layoff, based upon advice from the center director, she had requested additional hours from her other part time employer. When she was recalled for work with the employer, she advised the center director that she for a while she would have some periods of conflict between the two work schedules because of the hours she had picked up; she indicated to her that her attendance was not an issue and they would work around her schedule.

On June 4 the claimant called in an absence due to being at the hospital with a cousin for whom the claimant usually provided care who had been placed on life support. She was assessed a point for this occurrence. There may have been some other time the claimant missed some hours in early June because of the conflict with her other job; it is not clear what points were applied for those occurrences. However, by June 11 the employer concluded that the claimant had incurred at least 3.5 occurrences within 90 days, which results in discharge under the employer's attendance policy. She was not given any warning prior to the discharge advising her that her attendance was placing her job in jeopardy.

The claimant had established an unemployment insurance benefit year effective May 9, 2010.

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).

The reason cited by the employer for discharging the claimant is her attendance. Excessive unexcused absences can constitute misconduct, however, 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. Higgins, supra. To the contrary, on or about June 1 she had been assured that her attendance was not an issue. Further, two of the points were due to absences due to illness, which are treated as excused 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). Therefore, less than half of the

occurrences serving as the basis for the termination could be treated as unexcused, and the employer has not established that the claimant had excessive unexcused absences. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2009 and ended December 31, 2009. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's July 29, 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. The employer's account is not subject to charge in the current benefit year.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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