**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**KAYLEE GIBSON**
Claimant

**CARE INITIATIVES**
Employer

**APPEAL NO. 15A-UI-10540-S1-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 08/16/15**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Care Initiatives (employer) appealed a representative's September 10, 2015, decision (reference 03) that concluded Kaylee Gibson (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 2, 2015. The claimant participated personally. The employer was represented by Alyce Smolsky, Hearings Representative, and participated by Lori Harvey, Administrator, and Kelly Rohrbouck, Lead Unemployment Insurance Consultant. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 7, 2015, as a full-time certified nurses' aide. The claimant signed for receipt of the employer's handbook on January 7, 2015. On March 16, 2015, the employer issued the claimant a verbal warning for her absences on March 11 and 12, 2015. The claimant was hospitalized for two days and did not find a person to work her shifts. The employer notified the claimant that she will not miss any more days of work and if she does she must find her own replacement.

On March 16, 2015, the claimant's infant daughter stopped breathing and the claimant left work early. She was not scheduled to work on March 17 and 18, 2015. The claimant talked to the assistant director of nursing on March 18, 2015. The claimant told her she would not be at work on March 19, 2015, because her daughter was transferred to Blank Children's Hospital and was not breathing on her own. The assistant director of nursing told the claimant to take care of her daughter and not to worry about being absent.

The employer did not know the claimant talked to the assistant director of nursing and considered the claimant have failed to appear without calling in for her shift on March 19, 2015. The employer terminated the claimant in their system for the claimant's absence. On March 20,

2015, two hours before the start of her shift, the claimant called the assistant director of nursing and asked if she should come to work. The assistant director of nursing told the claimant she did not need to come to work as the employer found a replacement for her shift that day. The employer was unaware of the assistant director of nursing's conversation.

The claimant was not scheduled to work on March 21 and 22, 2015. The claimant was living with a co-worker. The co-worker told the claimant that the employer took the claimant off the schedule. The claimant called the employer but did not get an answer.

The claimant filed for unemployment insurance benefits with an effective date of August 16, 2015. The employer did not effectively participate in the fact-finding interview on September 8, 2015.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In light of good faith effort, absences due to inability to obtain child care for sick infant, although excessive, did not constitute misconduct. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991). The claimant properly reported her absence on March 19, 2015. She was absent because her infant daughter was not breathing and in the hospital. The employer terminated the claimant because the employer thought she did not appear for work or report her absence for March 19, 2015.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's September 10, 2015, decision (reference 03) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css