IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KIMBERLY K WELLS
Claimant

ABM JANITORIAL SERVICES NORTH
Employer

APPEAL NO: 11A-UI-04427-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/20/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

AMB Janitorial Services North (employer) appealed a representative's March 29, 2011 decision (reference 01) that concluded Kimberly K. Wells (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 April 28, 2011. The claimant participated in the hearing. Nina Burcham of Employer's Edge appeared on the employer's behalf and presented testimony from one witness, Angela Lavin. During the hearing, Employer's Exhibit One 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 July 21, 2010. She worked full time as a scrubber driver in the employer's Waterloo, Iowa business client's factory, working schedule of Monday through Friday, 2:00 p.m. to 10:30 p.m., plus every third weekend. Her last day of work was February 18, 2011. The employer suspended her that day and discharged her on February 23, 2011. The reason asserted for the discharge was excessive absenteeism.

The employer's policy provides for discharge after five occurrences in a 180-day period. The claimant had left and returned from a doctor's appointment (for which she had a doctor's note) for a medical condition on September 14, 2010, was 45 minutes late after a doctor's visit (for which she had a doctor's note) with her son on October 1, 2010, and left 1.5 hour early on October 5 and 2.0 hours early on October 6, 2010 due to childcare issues. As a result she had been given a suspension and final warning on October 12, 2010.

On February 17, 2011 the claimant had a phone call from her son's girlfriend indicating that the claimant's son was suicidal. The claimant called her supervisor to discuss her options. The supervisor told the claimant that two of her absences had "dropped off," so that she would be

okay if she was absent. When she returned to work on February 18, she learned that the information that two absences had "dropped off" so that she would be okay was incorrect, and so she was suspended and then discharged. Had the claimant not been advised that the days had "dropped off" so that she would be okay to miss work, she would have taken other actions.

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). 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). Here the claimant was led to believe that the final incident would not jeopardize her job; she did not intentionally violate the attendance policy when she was absent that day. Further, the reason for her absence was of a sufficiently emergency nature as to be excused. Cosper, supra. 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 March 29, 2011 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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