IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARY A BERMEL
Claimant

THE HON COMPANY
Employer

APPEAL NO: 09A-UI-10234-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/25/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The HON Company (employer)) appealed a representative's July 9, 2009 decision (reference 01) that concluded Mary A. Bermel (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 August 4, 2009. The claimant participated in the hearing. Patton Bennett of Employers Edge, L.L.C. appeared on the employer's behalf and presented testimony from one witness, Molly Robbins. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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 December 8, 1997. She worked full time as a workcell operator at the employer's Muscatine, Iowa location. She normally worked from 5:00 a.m. to 1:30 p.m. or 2:30 p.m., Monday through Friday. Her last day of work was June 1, 2009. The employer discharged her on June 9, 2009. The reason asserted for the discharge was excessive absenteeism.

As of June 9 the claimant had eight attendance occurrences. The most recent warning the claimant had received was on May 18, 2009, when she was given a verbal warning for having reached a fourth occurrence. The fourth occurrence was a leave of absence for personal matters from May 4 through May 15. The claimant had also been absent for three days around April 20 due to the death of a grandmother; while the employer allows three days' bereavement leave, regardless of whether the claimant attended the funeral or not, it had not been satisfied with the documentation the claimant had provided as to the grandmother's passing, and as of June 1 was still seeking additional verification.

The claimant was absent beginning June 2. She called in to report that she was experiencing neck pain related to a prior back injury. The employer asserted that the claimant did not call in each day; however, the claimant testified that she had called in each day, and that she had indicated she was going to her doctor on June 8. On June 5 Ms. Robbins, a member and community relations generalist, called and left a message for the claimant that she still needed to get further documentation on the grandmother's passage, although no deadline was specified. The claimant did receive the message, but felt the employer was primary attempting to harass her. While she had obtained additional information, she did not feel she needed to respond or provide that documentation until she was recovered enough to return to work. However, when the claimant did not respond to the phone call and did not return to work, and when Ms. Robbins was given to understand that the claimant had not been calling in every day, she was discharged.

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). 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 or injury 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). The employer has not established by a preponderance of the evidence that the claimant did not properly call in her absences. Because the final absence

was related to properly reported illness or injury, 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 July 9, 2009 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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