IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELA F POGGENPOHL
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL NO: 18A-UI-08696-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/29/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 13, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 18, 2018. The claimant participated personally. The employer participated through Mary Eggenburg, benefits specialist and Makenzie Stumpf, human resources coordinator. Employer Exhibit 1 was admitted into evidence.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, 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 disqualifying job-related misconduct?
Did the claimant voluntarily quit the employment with good cause attributable to the employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a nursing unit clerk beginning in 2000, and was separated from employment on July 30, 2018, when she was discharged for excessive, unexcused absences (Employer Exhibit 1).

The employer has an attendance policy which states that attendance is requirement for continued employment. It does not have a policy which designates a certain amount of absences or occurrences may lead to discharge. The employer also utilizes human resources

attendance guidelines which indicate that an employee may be investigated and disciplined if they have 16 hours or more of absences in a quarter. The claimant was made aware of the employer's policy during employment. She denied knowledge of the attendance guidelines, which the employer indicated is only shared verbally with employees.

Prior to discharge, the claimant received a written reprimand on June 18, 2018 for a patient care issue, unrelated to attendance. The claimant was also issued a three day suspension on December 21, 2017, for having used 55 sick hours in one quarter. The employer did not have details of the dates of the absences or reasons. In addition, the claimant also received prior warnings for attendance on May 7, 2012, October 5, 2012 and March 28, 2014.

On July 9, and July 10, 2018, the claimant properly reported her absences which were due to her eight year old son being sick. When she returned to work, there was no discussion about her job being in jeopardy as a result of the absences. On July 20, 2018, the claimant notified her manager that she would be absent after retrieving her minor daughter from the police station at 3:30 a.m. that morning. She had a follow up conversation with her manager about related matters at home.

On July 23, 2018, the claimant was working when she received a phone call that her sixteen year old daughter was threatening self-harm. The claimant made attempts to reach her mom and grandmother to go be with the daughter unsuccessfully. Concerned for both her daughter and her job, she asked her manager if leaving to go be with her daughter would place her job in jeopardy. He consulted with human resources before telling the claimant that she needed to do what she felt was best for her. The claimant then left early to tend to her daughter. As a result of the daughter's incident, she did receive medical care, and the claimant provided her manager a copy of the doctor's note on July 26, 2018, which confirmed there had been a legitimate incident involving the daughter. On July 30, 2018, the claimant was then discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $3,514.00, since filing a claim with an effective date of July 29, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Mary Eggenburg participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

In the specific context of absenteeism the administrative code provides:

Iowa Admin. Code r. 871-24.32(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.

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The employer in this case could only identify four specific attendance occurrences that led to separation: July 9 and 10, 2018, July 20, 2018 and July 23, 2018. The claimant's absences due to her child's illness on July 9 and 10, were properly called off, and attributed due to illness, and therefore excused in the context of this analysis. The claimant's absence on July 20, 2018, when she was at the police station with her daughter before work, may have been considered unexcused, inasmuch as the claimant did not elaborate why she

could not return to work (albeit after a long night). That leaves July 23, 2018, when the claimant left early to tend to her child, who was threatening self-harm.

There are two possible interpretations of the claimant's final absence, both of which lead to the conclusion that it should be excused. The first is that it was for "illness or other reasonable grounds", and properly reported to the employer, in which case there is no final incident of an unexcused absence. The claimant in this case made a good faith attempt to find other care for her daughter by way of her mother and grandmother, to no avail.

A good faith inability to obtain childcare for a sick infant may be excused. See *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The administrative law judge is persuaded that this scenario is similar inasmuch as the claimant had a child who was sick, needing immediate care and supervision (as confirmed by a doctor's note she provided to the employer upon returning to work) and she could not secure childcare for the daughter. Under this analysis, the claimant's final absence would be considered excused.

The second is that even if the reason for the absence itself was not considered excused, based upon the reason provided for leaving, the employer in essence acquiesced to the absence based on its communications with the claimant. The claimant point blank asked the employer if leaving would have a detrimental impact on her job, as she weighed her options. The employer was not forthcoming in saying, "Yes: it will trigger an investigation and you could be fired" but rather evaded the question, advising the claimant to do what she felt was best. Based on the employer response, the claimant reasonably believed she would not lose her job and left to be with her child. For this reason, the administrative law judge is not persuaded the claimant's final absence should be considered unexcused.

Therefore, the employer has established one unexcused absence on July 20, 2018. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007). Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility.

Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The August 13, 2018, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is allowed benefits provided she is otherwise eligible. The claimant is not overpaid benefits. The employer is not relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn