IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARFA A SALERMO Claimant **REMBRANDT ENTERPRISES INC** Employer	**APPEAL 19A-UI-07658-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/25/19** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On September 23, 2019, the claimant filed an appeal from the September 16, 2019, (reference 02) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 23, 2019. Claimant participated personally through Interpreter 110762 with CTS Language Link. Employer participated through human resource specialist Teresa Torres and human resource generalist Ann Sassman. Official notice was taken of claimant's appeal letter. Employer's Exhibit 1 was received.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On September 16, 2019, Iowa Workforce Development mailed a reference 02 unemployment insurance decision to claimant that denied benefits. The decision warned an appeal was due by September 26, 2019. On September 23, 2019, claimant filed an appeal via U.S. mail. On September 27, 2019, claimant sent an additional email to Iowa Workforce Development Appeals Bureau regarding her appeal. The Appeals Bureau received the email before it received the letter sent by mail. Therefore, an incorrect appeal date was used by the Appeals Bureau and timeliness was listed as an issue on the hearing notice. The Appeals Bureau later received the letter postmarked prior to the due date for an appeal. Official notice was taken of the appeal postmarked on September 23, 2019.

Claimant began working for employer on September 5, 2018. Claimant last worked as a full-time breaker/candler. Claimant was separated from employment on August 27, 2019, when she was terminated.

Employer has an attendance policy stating that employees will be terminated after accruing nine attendance points. The policy states that a no-call/no-show absence will result in three points and defines a no-call/no-show absence as a situation where an employee fails to report to work or report an absence within three hours of the start of the shift. Claimant was aware of the policy.

Claimant was absent on May 13 and 26, 2019, due to illness. Claimant properly reported the absences. Employer gave claimant one point for each absence.

Claimant was absent on July 5, 2019, because she was returning late from a personal trip. Claimant did not report the absence to a supervisor until after the shift ended. Employer gave claimant three points for the absence.

On July 11, 2019, employer gave claimant a corrective action for attendance because she had accrued five attendance points.

On August 21, 2019, claimant left work early without employer's approval. Employer gave claimant one point and told claimant to come in the next morning at 9:00 a.m. to talk about it.

On August 22, 2019, claimant came in late at 10:00 a.m. because of a migraine headache. Claimant did not inform employer she was coming in late until sometime after 9:00 a.m. Employer gave claimant one point for being tardy for the meeting without timely notice.

On August 26, 2019, claimant was absent due to a doctor's appointment. Claimant properly reported the absence. The doctor issued claimant a note excusing her from work that day. Employer did not issue any attendance points for the absence.

On August 27, 2019, claimant was scheduled to work at 5:30 a.m. Claimant did not appear for work and did not report she would be absent. Claimant thought she was going to be terminated, so rather than appear for her work at her normally scheduled time, claimant appeared in the human resource office at 9:30 a.m. Employer gave claimant three points for a no-call/no-show absence that day. This put claimant at ten attendance points. Employer terminated claimant's employment.

REASONING AND CONCLUSIONS OF LAW:

In this case, claimant's appeal of the reference 02 decision is timely.

Iowa Code section 96.6(2) provides, in pertinent part:

> The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

Claimant filed her appeal within ten days after the initial decision denying benefits was mailed to her. Therefore, her appeal is timely.

The next issue is whether claimant's separation form employment disqualifies her from receiving unemployment insurance benefits.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences due to properly reported illness are excused, 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. In this case, claimant's last absence was unexcused. Because claimant did not properly report her absence within three hours of her scheduled start time, employer properly attributed three points to her attendance record.

Claimant was also absent on other occasions for reasons that are considered unexcused under unemployment law. For instance, claimant's absence due to coming home late from a trip and leaving work early are not considered excused under unemployment law. The only point awarded that is questionable is the point for claimant's tardiness on August 22, 2019. Even without that point, though, claimant has accrued nine attendance points.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The September 16, 2019, (reference 02) decision is affirmed. The appeal is timely. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Christine A. Louis
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Decision Dated and Mailed

cal/scn