IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WINDY R PETERSEN Claimant **FEDEX GROUND PACKAGE SYSTEM INC** Employer	**APPEAL 22A-UI-07743-DH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/27/22** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quitting
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules
Iowa Admin. Code r. 871-24.32(7) - Excessive Unexcused Absenteeism
Iowa Admin. Code r. 871-24.25(4) - Absent Three Days with no Notice

STATEMENT OF THE CASE:

Claimant/appellant, Windy Petersen, filed an appeal from the March 25, 2022, (reference 01) unemployment insurance decision that denied benefits, finding the discharge from work on 12/15/21 was for excessive unexcused absenteeism. After proper notice, a telephone hearing was conducted on May 6, 2022. Claimant personally participated personally. Employer, FedEx Ground Package System, Inc. participated through Evekiel Winans, sort manager. Judicial notice was taken of the administrative records. Employer's Exhibit was not admitted as claimant did not receive a copy of the exhibit and employer did not know if it was sent to claimant.

ISSUE:

Was the separation a layoff, discharged for misconduct or a voluntary quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed part-time, as a package handler with a set schedule. Her first day worked was 11/18/21. Her last day worked was 12/6/21. Claimant was separated from employment on 12/15/21 when she was discharged for job abandonment. Employer does not know if claimant received any disciplinary action.

Employer has an employee handbook which claimant was given a copy of or access to an electronic copy at her first day of employment. Claimant acknowledges this.

Employer testified that claimant no call / no showed for the following dates: December 7, 8, 9, 10, 13, 14, 15, 2021. While claimant no called / no showed December 14, 2021, since the employer did not call her on that date, their policy treats it as an unexcused absence. These incidents are why employer discharged claimant.

Claimant was dealing with a worker's compensation claim with employer and with employer's agent on the claim, Sedgwick. Donna Kranz, with Sedgwick advised claimant that if employer, FedEx did not have work that met her restrictions, she was to go home and call Ms. Kranz and let her know. On December 6, 2021, she talked with Chris Johnson, a supervisor with employer about all this and Mr. Johnson did not have any work that met her restriction. As such, claimant told Mr. Johnson she was going home per Ms. Kranz's communication. Claimant got in touch with Ms. Kranz, who told her to stay home, and she (Ms. Kranz) would be in touch with claimant when they (Sedgwick/employer) knew more. Claimant called at lease once daily and Mr. Johnson repeatedly, being given Mr. Johnson's voicemail. Claimant submitted an updated restrictions letter, with less restrictions, but found out she had been let go a few days earlier.

When Mr. Winans was asked about this, employer advised he had no information regarding this and does not know whether this happened or not, but if it did happen, then the no call / no shows would not have been counted as she was directed by Sedgwick to stay home. It is determined that this is what happened and either there was insufficient communication either between Sedgwick and FedEx or within FedEx. Claimant was following the instructions of employer/employer's agent.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying misconduct.

Iowa Code section 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.

871 IAC 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.

Iowa Admin. Code r. 871-24.1 provides:

> Definitions.
>
> Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.
>
> 24.1(113) *Separations.* All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> c. *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

To the extent that the circumstances surrounding each incident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil

design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer has failed to prove they had previously warned claimant about any issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). 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. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

Second, the absences must be unexcused. *Cosper* at 10. 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 related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer admits that claimant was never warned about his absences nor that further absences could result in termination of employment.

Absences must be unexcused. Here, claimant was directed to stay home and wait to be contacted which employer advised that they did not know whether this happened, but if it did, then these events did not count. There were no no call/no shows then.

Employer has failed to meet their burden in proving misconduct (excessive unexcused absences) to warrant employer discharging claimant. Claimant was never warned, nor knew his job was in jeopardy. While employer may have had good reasons to let claimant go, there was no disqualify reason proven and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

Iowa Admin. Code r. 871-24.25(4) and (20) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). “Good cause” for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm’n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Claimant failed to call in and failed to show up for work on the above dates in fact finding. However, claimant established this was due to employer’s agent telling her to do so, which she communicated to employer. Employer advised they do not know if this did happen, but if it did, then there should have been no separation. As such, there was no voluntary quit.

DECISION:

The March 25, 2022, (reference 01) decision is **REVERSED**, as there was no misconduct and no voluntary quit. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed andwithheld on this basis shall be paid.

Darrin T. Hamilton
Administrative Law Judge

May 31, 2022
Decision Dated and Mailed

dh/kmj