IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BETTY J PITCHER Claimant **KWIK SHOP INC** Employer	**APPEAL 21A-UI-20035-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/06/21** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Betty J Pitcher, the claimant/appellant, filed an appeal from the September 7, 2021, (reference 01) unemployment insurance decision that denied benefits based on a June 8, 2021 discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on November 2, 2021. Ms. Pitcher participated and testified. The employer participated through James Moses, district manager, and Diane Pethound, location manager. The administrative law judge took official notice of the administrative record. Claimant's Exhibit A and Employer's Exhibit 1 were admitted as evidence.

ISSUE:

Was Ms. Pitcher discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Pitcher began working for the employer on June 27, 2020. She worked as a part-time associate. Her employment ended on June 8, 2021.

The employer's policy provides that employees are to call the store at least four hours before their scheduled shift if they will be absent. The policy further provides more than five absences in a year is excessive. The employer does not give part-time employees sick leave.

On June 6, 2021, Ms. Pitcher went to the hospital because she could not walk. Ms. Pitcher's doctor advised her to not work until she had a magnetic resonance imaging (MRI). Ms. Pitcher called in on June 6 and told Ms. Pethouse, her manager, about her doctor's advice. Ms. Pitcher did not attend work on June 6 or June 7 based on her doctor's advice. On June 8, Ms. Pethouse asked Ms. Pitcher to come to work. Ms. Pitcher did so, and as soon as she walked in, Ms. Pethouse told Ms. Pitcher that her employment was terminated because Ms. Pitcher missed too many days of work.

The employer had previously given Ms. Pitcher a verbal warning on January 15, 2021, a written warning on February 15, and a final written warning on April 5 for attendance issues. Ms. Pitcher had missed almost 25 days of work. Most of Ms. Pitcher's absences were due to illness and she reported each absence to the employer. Ms. Pitcher was also absent three separate times because she was self-quarantining due to COVID-19. Ms. Pitcher's husband has underlying health conditions that make him a high risk for complications if he tests positive for COVID-19 so Ms. Pitcher took all of the necessary precautions, including self-quarantining whenever her doctor advised her to do so.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Pitcher was discharged from employment for no disqualifying reason.

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.

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).

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.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) *Past acts of misconduct*. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

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).

Excessive absences are not considered misconduct unless unexcused. 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

Absences due to properly reported illness 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

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.

The most recent incident leading to Ms. Pitcher's discharge must be a current act of misconduct in order to disqualify her from receiving benefits. In this case, the most recent act for which Ms. Pitcher was discharged was her June 6 and June 7 absences. Ms. Pitcher properly reported the absences – she called her manager on June 6 – and her absences were for reasonable grounds – her doctor advised her to not attend work until she had an MRI. This is not misconduct. The employer has failed to meet its burden of proof in establishing disqualifying job-related misconduct. Benefits are allowed.

DECISION:

The September 7, 2021, (reference 01) unemployment insurance decision is reversed. Ms. Pitcher was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Daniel Zeno
Administrative Law Judge
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December 2, 2021
Decision Dated and Mailed

dz/scn