IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JUSTIN D WENDELBOE Claimant **CONSUMER SAFETY TECHNOLOGY LLC** Employer	**APPEAL 16A-UI-05954-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 25, 2016, (reference 06) unemployment insurance decision that denied benefits based upon his discharge for excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 14, 2016. The claimant, Justin Wendelboe, participated and testified. The employer, Consumer Safety Technoloy LLC, participated through human resources manager, Tiffany Riffle.

ISSUE:

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: Claimant was employed full time as a sales associate from November 30, 2015, until this employment ended on May 2, 2016, when he was discharged.

The employer has an attendance policy in place that allows employees to accumulate eight points within a 12 month rolling calendar year. Employees do not accumulate points for absences that are planned, covered by FMLA, for jury duty, or bereavement leave. All other absences are counted as one point for a full day or a half point if the employee misses between 30 minutes and two hours. If employees are unable to come to work they are expected to call and notify the employer of this, though there is no set time frame in which they are required to do so. This policy went into effect in April 2016. Claimant received a copy of and understood the policy.

On April 6, 2016, claimant was absent from work due to lack of childcare for the day. Claimant was absent again on April 14 and 15 because his infant child was very ill and he needed to care for her. On all three dates claimant called in to report he would not be at work. Claimant was again absent April 25 through April 29, 2016, when he contracted a virus and his doctor advised him not to go to work to prevent infecting other employees. Claimant called in each day to properly report his absences due to illness. Claimant was assessed one point each day he was

gone in April for a total of eight points. On May 2, 2016, the employer called claimant to notify him that he was being terminated for violating the attendance policy. Riffle testified that claimant's supervisor counseled him on his attendance prior to the employer terminating his employment, though she was not sure when this counseling occurred or if claimant was warned his employment was in jeopardy. Claimant testified he received no counseling or warning about his attendance prior to his termination.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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 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). Excessive absences are not considered misconduct unless unexcused. 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*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

The requirements for a finding of misconduct based on absences are therefore 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* 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.* 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).

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Two of claimant's eight absences were related to caring for a sick infant and would likely be considered excused. Claimant's most recent absences, and the ones that led to his termination, were due to his own illness and therefore excused for the purposes of unemployment insurance benefits. Because his 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, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

It should also be noted that 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. Here, the employer did not present a witness with direct knowledge regarding the counseling it claims claimant received. Riffle could not confirm when this counseling was given or if claimant was warned his job might be in jeopardy. Claimant provided credible testimony denying he received any such counseling. Inasmuch as employer had not previously warned claimant about the 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. Benefits are allowed.

DECISION:

The May 25, 2016, (reference 06) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/pjs