IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SAVANNAH J REYNOLDS Claimant **KLED 6 INC** Employer	**APPEAL 19A-UI-10111-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/24/19** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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:

On December 20, 2019, KLED 6, Inc. (employer) filed an appeal from the December 11, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Savannah J. Reynolds (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing began on January 16 and concluded on January 22, 2020 due to legibility issues with proposed exhibits. The claimant participated personally. The employer participated through Jenna Gruchow, Manager, and Marissa Hauptmann, Area Manager.

The Claimant's Exhibit A and the Employer's Exhibits 4 through 7 were admitted into the record without objection. The Employer's Exhibits 1 and 2 were admitted over the claimant's objections to foundation. The Employer's Exhibit 3 was not admitted into the record as the first copy was partially illegible and the second copy had been altered removing some information and clarifying others. The administrative law judge took official notice of the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and the employer's account charged?

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 Stylist beginning in June 2018, and was separated from employment on November 24, 2019, when she was discharged. The employer has an attendance policy that states employees are responsible for finding coverage for missed shifts and they are responsible for notifying management if they are going to miss work. The employer does not have any policies related to no-call/no-show absences. The claimant had

absences prior to November 20, 2019; however, the employer did not give her any warnings or take those absences into account when making its decision to end her employment.

The claimant was scheduled to work on November 21 beginning at 9:00 a.m. She notified her supervisor at 8:00 a.m. that she was going to be late as she needed medical attention. The claimant was rescheduled to work from 12:00 p.m. to 8:00 p.m. At 1:40 p.m., Jenna Gruchow, Manager, contacted the claimant via text message to ask for a status update. The claimant responded that she was waiting on blood work. At 4:00 p.m., Gruchow again asked for an update, but the claimant did not respond and did not report to work that day.

The claimant was scheduled to work on November 22 from 3:00 p.m. to 8:00 p.m. Around 1:00 p.m., the claimant called the store and spoke with Marissa Hauptmann, Area Manager. The claimant told Hauptmann she was going to the emergency room and may be late. The claimant also notified Gruchow via text message that she was at the emergency room and might be done but she would let them know. Around 4:00 p.m., Gruchow contacted the claimant for an update and the claimant stated she did not know when she would be to work. The claimant left the emergency room before 5:00 p.m. but did not report to work or notify the employer she would not be reporting.

On November 24, the claimant reported for a staff meeting. At that time, Gruchow and Hauptmann told her that she was being discharged for two no-call/no-show absences on November 21 and 22.

The claimant has received unemployment benefits in the amount of $2,257.00, since filing a claim with an effective date of November 24, 2019, for the six weeks ending January 18, 2020. The employer provided documentation for the fact-finding interview.

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. 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 provides, in relevant part:

> 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.
>
> …
>
> (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 of misconduct 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 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 the 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

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.* 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 attendance policy 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 the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

In this case, the claimant reported to the employer before the start of her shift that she was having a medical issue that may prevent her from reporting to work. The claimant's absences were properly reported for purposes of unemployment insurance benefits. However, even if the claimant did not properly report her absences, two unexcused absences are not disqualifying since they do not meet the excessiveness standard. Because her absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Benefits are allowed.

In the alternative, even if the claimant's absences were excessive and unexcused, as the employer had not previously warned her about the issue leading to the separation, it cannot meet the burden of proof to establish that she acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. Benefits would still be allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The December 11, 2019, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

January 30, 2020
Decision Dated and Mailed

src/scn