**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **CHARISA K WOTHERSPOON**<br>Claimant<br><br>**OTTUMWA COMMUNITY SCHOOL DISTRICT**<br>Employer | **APPEAL 18A-UI-01454-NM-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 12/31/17**<br>**Claimant: Appellant (1)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 22, 2018, (reference 01) unemployment insurance decision that denied benefits based on her discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on February 26, 2018. The claimant participated and was represented by attorney Stu Cochrane. The employer participated through Superintendent Nicole Kooiker. Employer's Exhibits 1 through 6 and claimant's Exhibits A through D were received into evidence.

**ISSUE:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a teacher associate from October 12, 2015, until this employment ended on December 12, 2017, when she was discharged.

On November 2, 2017, claimant contacted Kooiker to request a medical leave of absence. (Exhibit 3). Kooiker testified claimant estimated she would need to be off the entire month of November. Kooiker further testified claimant confirmed she expected to be back on December 1, 2017 and would let the employer know if anything changed. Claimant testified she believed the conversation went slightly different, with a more open-ended return date. Claimant explained she was going into treatment, which she knew would last 30 days, but she also knew there would not be a bed available for two to six weeks. Kooiker denied claimant ever relayed this information to her.

Claimant did not return to work as expected on December 1, 2017. (Exhibit 4). When claimant did not return her immediate supervisor, Principal Steve Zimmerman, attempted to contact her via telephone daily. Zimmerman left multiple messages for claimant to please call him back to let him know what was going on. Claimant did not have access to her phone during this time period, so she was not immediately able to receive or respond to Zimmerman's messages. On December 8, 2017, Kooiker learned claimant still had not returned to work. Kooiker then made multiple attempts to reach claimant as well, including reaching out to coworkers who might have alternative telephone numbers for her. Kooiker left multiple messages for claimant both on her phone and at facilities where claimant was staying. When no response was received claimant was separated from employment on December 12, 2017. (Exhibit 1).

Claimant testified she could not contact her employer while she was receiving treatment because she did not have access to her telephone. According to claimant none of the doctors, nurses, or other individuals she was working with were willing to contact the employer on her behalf. Claimant argues she did not have the capacity, during the time in question, to call her employer to provide an update on the situation, though she was in occasional contact with friends and family during this time period. Claimant never asked her friends or family to provide an update to the employer. Claimant was discharged from care on December 20, 2017 and attempted to call Zimmerman on December 21, but got his voicemail. (Exhibit A). After several missed calls back and forth claimant eventually learned she had been separated from employment.

**REASONING AND CONCLUSIONS OF LAW:**

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

The decision in this case rests, at least in part, on the credibility of the witnesses, specifically as it relates to claimant's conversation with Kooiker on November 2, 2017. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.,* (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

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:
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> 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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Dep't of Job Serv.*, 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.

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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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 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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Courts have previously found that a failure to report an absence, or absences, may be excused when an employee cannot do so because he or she is incapacitated. 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. Here, the claimant was absent from work the entire month of November for medical reasons. The claimant communicated these absences with the employer and they are therefore excused. However, claimant was expected to return to work on December 1, 2017. Claimant did not return to work on December 1 and did not contact the employer again until December 21, 2017. A failure to report to work without notice for a three week time frame is excessive unexcused absenteeism.

While the claimant contends she was incapacitated and therefore could not contact the employer, she also admits she was in contact with other individuals during the period in question, differentiating her from the claimant in *Gimbel*, who was physically unable to report the absence. Claimant can also be differentiated from the claimant in *Roberts*, as that claimant provided medical documentation confirming her incapacity and inability to communicate. Unlike the documentation in *Roberts*, claimant's documentation confirms her dates of care, but provides no information indicating she lacked mental capacity to call her employer from

December 1, 2017 forward. Accordingly, the employer has met its burden in showing claimant had excessive unexcused absenteeism sufficient to establish disqualifying misconduct. In the alternative, since claimant did not follow up with the employer regarding her ability to return to work on December 1, 2017, her failure to continue reporting to work or to otherwise maintain contact with the employer until December 21, 2017 was an abandonment of the job. Benefits are withheld.

**DECISION:**

The January 22, 2018, (reference 01) unemployment insurance decision is affirmed. 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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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs