IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRITTANY EASLEY Claimant **COPART OF CONNECTICUT INC** Employer	**APPEAL 20A-UI-14921-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/23/20** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

On November 16, 2020, Copart of Connecticut Inc (employer/appellant) filed an appeal from the November 6, 2020 (reference 01) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed for excessive absences that were due to illness and were properly reported.

A telephone hearing was set for January 22, 2021. The parties were properly notified of the hearing. The hearing was rescheduled at that time, as the department had failed to provide to claimant the proposed exhibits employer submitted with its appeal. The parties agreed to continue the hearing to February 3, 2021.

A hearing was held at that time. Employer participated by Office Manager Christina Glogowski and was represented by ADP Hearing Representative Toni McColl. Brittany Easley (claimant/respondent) participated personally. Employer's Exhibits 1-5 were admitted. Official notice was taken of the administrative record.

ISSUE(S):

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant's first day of employment was August 8, 2016. The last day claimant worked on the job was August 25, 2020. Claimant worked for employer as a full-time member services CSR. In this position, claimant answered calls from customers. Claimant's immediate supervisor was Brandi Roberson. Office Manager Glogowski was the next supervisor in claimant's chain of command. Claimant typically worked Monday through Friday from approximately 8 a.m. to 5:30 p.m.

Claimant was discharged by Glogowski on August 25, 2020, due to her attendance. Employer's attendance policy requires employees to call their manager within 30 minutes of the start of their shift if they are to be unexpectedly absent due to illness. The policy requires employees to speak directly to their supervisor in person or by telephone in these instances. Excessive absences and failure to report absences on time may lead to discipline, including termination.

Claimant was most recently absent on August 18 and 21, 2020. Claimant was absent on those dates due to illness. Claimant did not call Roberson to report these absences as required but did report them via text message. Claimant and Roberson had agreed this would be sufficient to notify Roberson of absences. This arrangement was reached due to claimant having spotty phone reception in her area, which made it difficult for claimant to speak with Roberson by phone in the event of an unexcused absence. Roberson had not indicated to claimant that her continuing to notify her of absences by text message was a problem.

Claimant was previously late returning from dentist appointments by approximately an hour on August 4 and 5, 2020. These absences were preapproved but her lateness was not. The lateness was outside her control and was due to a scheduling error by the dentist. Claimant made employer aware of her lateness and the reason for it.

Claimant was also absent on August 12, 13, and 14, 2020 due to her daughter being potentially exposed to COVID-19. Employer mandated claimant go home on August 12 and would not allow her to return to work until it was confirmed that claimant did not have COVID-19. Claimant learned her daughter was negative for COVID-19 on the evening of Friday, August 14, 2020. She notified Roberson of that and returned to work on August 17, 2020, with a doctor's note to that effect. Claimant attempted to work remotely on August 13 and 14 but was unable to due to issues with her internet provider.

Claimant previously had absences in July 2020 which employer had excused. Claimant had previously received warnings regarding her attendance in October 2019 and February 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the November 6, 2020 (reference 01) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed for excessive absences that were due to illness and were properly reported is AFFIRMED.

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.

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.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd*., 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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).

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 is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a

forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. 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).

Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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*. 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).

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

The administrative law judge finds the most recent absences leading to claimant's discharge were not unexcused under Iowa law. This is because the absences were for reasonable grounds and properly reported. The most recent absences on August 18 and 21, 2020 were due to illness and were reported to her supervisor as they had agreed to, as the mandated way of reporting had not worked in the past. The absences on August 12, 13, and 14 were mandated by employer and so not unexcused. Claimant's difficulty with her internet connection does not render those mandated absences unexcused. Finally, claimant's lateness on August 4 and 5 were not volitional and as

such were for reasonable grounds. Even if those two instances of lateness were unexcused, they were not excessive and so do not constitute disqualifying job-related misconduct. Prior absences in July were considered excused by employer. Any unexcused absences prior to that were not current acts of misconduct and so cannot form the basis of a disqualifying discharge.

Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The November 6, 2020 (reference 01) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed for excessive absences that were due to illness and were properly reported is AFFIRMED. The separation from employment was not disqualifying. Benefits are allowed, provided claimant is not otherwise disqualified or ineligible.

Andrew B. Duffelmeyer
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February 17, 2021
Decision Dated and Mailed

abd/kmj