IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

LADONNA C DAVIS
Claimant

KFC OF AMES IOWA LLC
Employer

APPEAL NO. 13A-UI-09228-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/14/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the August 2, 2013, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 16, 2013. Claimant participated. Employer participated through manager Usman Latis and district manager Emin Yilmaz. Employer's Exhibits 1 through 5 were received. The administrative law judge took official notice of the administrative record.

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 part-time as a crew member. Her last day of work was June 28, 2013. On July 8 former manager Will Reed fired her because she allegedly used the computer to print off an airline ticket at work on June 12. (Employer's Exhibits 1 and 3, p. 2) Manager Andrew used his code to enter the computer and print the ticket and told her not to tell anyone he did that. He said nothing about the absence on June 28, being a reason for the separation. The employer's fact-finding interview statement was consistent with claimant's recollection and added that she had too many write-ups, which were for unrelated reasons. (Employer's Exhibit 2) At hearing the employer had difficulty focusing on a final act that triggered the termination decision. (Throughout the half-hour process, Yilmaz repeatedly interrupted Latis and coached him on answers, even after requests, and then admonishments, from the ALJ not to do so.) At no time from the fact-finding interview through hearing did the employer say she was discharged for failure to sign the June 28, counseling notice or that she was notified that failure to do so would result in her discharge. The employer finally settled on the final act of claimant calling to report her absence due to illness on June 28. (Employer's Exhibit 3, p. 1) She awoke at 6:30 a.m. and felt ill because of low blood sugar so she administered insulin and had to lie down for two hours, at which time she was able to call manager Kim Roche on her cell phone to report the absence. The employer requires employees report absences at least four hours before their scheduled shift. Roche did not say anything about the timing of the call, request a medical

excuse and replaced her on the scheduled 11 a.m. shift. Roche did not participate in the hearing or provide a written statement. Claimant did not go to the store that day and did not miss work to pack for her vacation (June 29 through July 7). She had no written warnings about attendance. She did not have a phone conversation with Reed on June 28 or use "inappropriate language" with him. Reed did not participate in the hearing, had not provided a written statement, and the employer could not describe what was said that it considered "inappropriate" or what Reed claimed she said to him. Claimant called about her schedule on July 8, and was notified she had been fired.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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.

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.

871 IAC 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 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). 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).

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 assess points or impose discipline up to or including discharge for the incident under its policy. A warning for insubordination is not similar to attendance or unauthorized use of computer equipment and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

Even were the ticket printing a current act, the employer has not established that it had warned claimant that such conduct was prohibited, especially given a manager's authorization and carrying out of the act.

871 IAC 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 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. The employer's policy requiring report of the absence four hours in advance of the shift is unreasonable, particularly in this instance. Claimant's delay in reporting her absence, still two-and-a-half hours before her shift start time, was reasonable given her need to administer insulin and address her immediate illness. 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.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because her final absence was related to properly reported illness, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. The employer has also failed to establish excessive absenteeism.

Since the employer has not established misconduct for any of the proposed final reasons for the separation, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The August 2, 2013, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs