IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARY D KIMBALL Claimant **IA DEPT OF HUMAN SVCS/WOODWARD** Employer	**APPEAL 19A-UI-01171-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/20/19** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(1) - Able to Work - illness, injury or pregnancy
Iowa Admin. Code r. 871-24.23(35) - Availability Disqualifications

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 6, 2019, (reference 01) unemployment insurance decision that denied benefits based on her discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on February 26, 2019. Claimant participated and testified. Employer participated through Hearing Representative Donna Henry and witness Diane Stout. Employer's Exhibits 1 through 7 were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 3, 2003. Claimant last worked as a full-time resident treatment worker. Claimant was separated from employment on June 25, 2018, when she was discharged.

The employer has an attendance policy in place which allows employees up to ten attendance occurrences within a rolling 12-month period. (Exhibit 7). If an employee is absent consecutive days, the absence only counts as one occurrence. The first five occurrences are not subject to disciplinary action, but progressive discipline begins at six occurrences and ends at ten with termination. Claimant received a copy of and understood this policy. (Exhibit 6).

According to Exhibit 1, in the 12-month period leading up to her termination, claimant accumulated the following occurrences, for a total of 18 missed days of work:

June 30, 2017	March 26-28, 2018
November 17, 2017	April 20 and 23, 2018
December 1, 2017	April 25, 2018
December 10, 2017	May 16-18 and 21-22, 2018
December 13, 2017	June 19-20, 2018

Claimant did have approved FMLA for both herself and her spouse. Any time that was taken off as FMLA was not counted as an occurrence, though claimant did exhaust her FMLA time during the last 12 months of employment.

Claimant received disciplinary action related to her attendance on December 19, 2017, April 6, 2018, April 27, 2018, and May 25, 2018. (Exhibits 2 through 5). Each warning advised that further unexcused absences may result in further disciplinary action. Claimant understood, after the May 25 warning was issued, that she was at risk of being discharged from employment. Claimant testified her absences were all related to either her health or ongoing medical condition of her spouse, though she could not say which absences were attributable to each or provide details on the specific circumstances surrounding each absence. Claimant did recall that the final absences, on June 19 and 20, were because her wife was experiencing very high blood pressure. Claimant was not comfortable leaving her wife home alone, though she was not directed by her wife's treating doctor that it was necessary for her to stay home. Claimant received notice on June 25, 2018 that she was being discharged based on her attendance. (Exhibit 1).

At the time of the hearing claimant also provided testimony regarding a workplace injury she sustained approximately a year and a half ago. Claimant has been on light duty restrictions since that injury and cannot lift more than 10 pounds or do any work that requires bending or squatting. Claimant does not have any work experience that would fall within these restrictions.

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.

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(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.

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. 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). 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).

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. Claimant was absent 18 days, for a total of ten occurrences, during the last 12 months of her employment. Claimant testified some of those absences were due to her own health issues and others were due to ongoing health issues involving her spouse. Claimant's absences related to her own health issues would be excused, if properly reported. However, claimant has failed to establish that her presence with her spouse was medically necessary or at the advice of a treating doctor. As such, those absences, including the final absence, are unexcused. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld. As benefits are denied, the issue involving claimant's ability to and availability for work are moot at this time.

DECISION:

The February 6, 2019, (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. The issues of claimant's ability to and availability for work are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs