IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMBER R NIEDERKLOPFER Claimant **JELD WEN INC** Employer	**APPEAL 22A-UI-07118-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/13/22** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

Jeld-Wen Inc, the employer/appellant, filed an appeal from the March 11, 2022, (reference 04) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 19, 2022. The employer participated through Sharon Miller, plant administrator, and Fern Kidder, human resources manager. Ms. Niederklopfer did not participate in the hearing. The administrative law judge took official notice of the administrative record. Employer's Exhibit 1 was admitted into evidence.

ISSUE:

Did the employer discharge Ms. Niederklopfer from employment for disqualifying job-related misconduct?

Was Ms. Niederklopfer overpaid benefits? If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Niederklopfer began working for the employer on March 29, 2021. She worked as a full-time general production worker. Her employment ended on August 31, 2021.

The employer uses an attendance point system. During the first ninety days of employment an employee is subject to termination of employment if they accrue two points. Outside of the first ninety days, the employer gives an employee a first warning when the employee accrues three points and a second warning when the employee accrues five points. Employees who accrue six points are subject to termination of employment. If an employee misses multiple days of work and submits a doctor's note, the employer issues the employee one point. If an employee calls in for other reasons, such as a family member being involved in a car accident, the employer requires the employee to provide proof, otherwise the absence is counted as unexcused. Ms. Niederklopfer acknowledged receiving a copy of the policy on March 29, 2021.

On June 18, the employer gave Ms. Niederklopfer a warning dated June 8 for accruing 1.5 total points. This was during Ms. Niederklopfer's first ninety days of employment. The warning was for Ms. Niederklopfer leaving early and missing half of her April 8 shift (1 point), and for missing up to half of her June 6 shift (0.5). Ms. Miller testified that the employer should not have given Ms. Niederklopfer 0.5 points for June 6 since the employer sent Ms. Niederklopfer home that day due to lack of work. At that time, Ms. Niederklopfer's corrected total points was 1 for April 8.

On August 5, the employer gave Ms. Niederklopfer a warning dated July 22 for accruing 3.5 total points. The warning included the 1.5 points from the June 18 warning. The warning was also for Ms. Niederklopfer missing half of her July 7 shift (1 point), and for not calling in and not attending work on July 14 (1 point). Ms. Miller testified that the employer should not have given Ms. Niederklopfer 1 point for July 7 since the employer sent Ms. Niederklopfer home that day due to lack of work. At that time, Ms. Niederklopfer's corrected total points was 2 for April 8 (1 point) and July 14 (1 point).

On August 17, the employer wrote a warning for Ms. Niederklopfer for accruing 7.5 total points. The warning included the 3.5 points from the August 5 warning. The warning was also for Ms. Niederklopfer calling in sick on July 28 and providing a doctor's note (1 point), for leaving early and missing half of her August 5 shift because her child was in a car accident, for not attending work on August 10 (1 point), and for leaving work early and missing half of her August 10 shift (1 point). Ms. Miller testified that the employer should have given Ms. Niederklopfer 1 point for August 10 instead of 2 points because Ms. Niederklopfer did attend work that day but left early and missed half of her shift. At that time, Ms. Niederklopfer's corrected total points was 5 for April 8 (1 point), July 14 (1 point), July 28 (1 point), August 5 (1 point), and August 10 (1 point).

At the beginning of her August 18, Ms. Niederklopfer's manager told her that her employment was over because she had accrued 7.5 points. Sometime around August 23, Ms. Niederklopfer gave the employer a doctor's note dated August 23 covering July 7, July 14, July 28, August 10, and August 15. Ms. Miller was suspicious of the doctor's note because there were misspelled words on the note. Ms. Miller called the telephone number on note and reached voicemail. The voicemail message did not name a medical clinic or doctor. Ms. Miller searched on the internet for the telephone number listed on the doctor's note and did not find that telephone number connected to a medical office. Ms. Miller considered the note illegitimate and it did not excuse any of Ms. Niederklopfer's absences. Ms. Miller then sent a message to the employer's human resources staff letting them know that the doctor's note was not legitimate. On August 31, the employer terminated Ms. Niederklopfer's employment for excessive unexcused absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Ms. Niederklopfer from employment for no disqualifying reason.

Iowa Code section 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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

> (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.
>
> (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 purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

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 the claimant from employment, 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Excessive absences are not considered misconduct unless unexcused. 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 determination of whether

unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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*, 321 N.W.2d at 9; *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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

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. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 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).

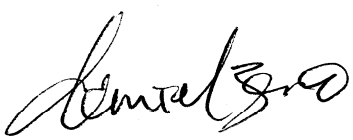
In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 impose discipline up to or including discharge for the incident under its policy.

In this case, by the employer's own testimony, Ms. Niederklopfer never accrued six points. By the employer's count, Ms. Niederklopfer had accrued only five points by August 17. The employer inaccurately calculated the points it should have given Ms. Niederklopfer and did not follow its own policy that subjected employees to termination only if they accrued six points. The employer has failed to establish disqualifying, job-related misconduct according to its own policy. Benefits are allowed.

Since Ms. Niederklopfer is eligible for benefits, the issues of repayment and chargeability are moot.

DECISION:

The March 11, 2022, (reference 04) unemployment insurance decision is REVERSED. The employer discharged Ms. Niederklopfer from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Daniel Zeno
Administrative Law Judge
Iowa Workforce Development
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

April 26, 2022
Decision Dated and Mailed

dz/kmj