IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

LILIANA ROGEL CASTRO
Claimant

WHIRLPOOL CORPORATION
Employer

APPEAL NO. 18A-UI-05560-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Liliana Rogel Castro (claimant) appealed a representative's May 10, 2018, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Whirlpool Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 5, 2018. The claimant participated personally through Laura Mier, Interpreter. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 11, 2017, as a full-time assembler. The employer has an attendance policy that it posts in the workplace. It allows employees five personal days in a calendar year. Personal days are to be used for any absence. The claimant was not absent for any reason in 2017.

In January 2018, the claimant was absent five days for influenza A. The employer issued the claimant a written warning for her absences. The claimant's son broke his ankle at school. Her brother-in-law went to school to collect him because she could not be absent from work. She left early two days to take her son to two of three appointments. Her father took her son to the third appointment because she could not leave work. She was absent one day when her six-year-old daughter had the flu.

It was medically advised that the children go into therapy because the claimant's husband had been verbally abusive. The claimant's supervisor told her to apply for Family Medical Leave (FMLA). FMLA was approved by the employer and the claimant took her children to the recommended therapy twice. She properly reported her absences under the category of FMLA. The employer issued her a written warning for being absent and reporting her absences under

FMLA when an employee cannot be granted FMLA unless they have worked for the employer for at least one year. She was told not to be absent for three months or she could be terminated.

On April 17, 2018, the claimant reported her absence to the employer. She was absent because she overslept and had to take her children to school. On April 19, 2018, the employer terminated the claimant for excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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.

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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

The claimant's absences due to illness are not misconduct because they were properly reported. Her absences for therapy for her children were approved by the employer. The claimant took the time off because the employer approved the absences. The employer's subsequent rescinding of her FMLA does not make the claimant's absences unapproved.

Apart from the approved absences and the absences due to properly reported medical issues, the claimant was away from work for less than two full days for her children's medical issues. Her last absence was due to personal issues related to her children. Less than three days of unapproved absence in eight months is not excessive. The employer did not participate in the hearing and, therefore, provided no evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's May 10, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs