IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SHAREE S MILLER Claimant **HY VEE INC** Employer	**APPEAL 21A-UI-07760-ML-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/29/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 15, 2021, (reference 04) unemployment insurance decision that denied benefits based upon her voluntarily quitting work without good cause attributable to the employer. The parties were properly notified of the hearing. A telephone hearing was held on May 13, 2021. The claimant, Sharee Miller, participated personally. The employer, Hy-Vee Inc., participated through Store Manager Brandon Ledger and Unemployment Insurance Hearing Representative Barbara Buss.

Claimant's Exhibit's 1 through 3 were admitted into the evidentiary record.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
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 customer service clerk. Claimant was scheduled to work between 8 and 14 hours per week. Claimant had requested to be reclassified as a full-time employee in December 2020; however, such a reclassification did not occur. She began working for this employer on July 24, 2017, and her last day physically worked on the job was December 14, 2020. Claimant's immediate supervisor was Brandon Ledger.

Employer has a written policy in place providing that if an employee fails to report an absence for two shifts or more they are considered to have voluntarily quit their employment. Employer also an attendance policy. The policy directs staff to report an anticipated absence to a manager before the onset of their shift. Employees must notify the employer prior to each anticipated absence. Employees are instructed that texting, as opposed to calling, is not acceptable. Claimant was aware that the employer considered a text notification to be insufficient. These policies can be found in the employee handbook, or online through the "Huddle" application. Claimant was aware that the policies could be located on the Huddle

application. Claimant's personnel file contains a signed acknowledgment of claimant receiving the employee handbook.

On October 15, 2020, Mr. Ledger met with claimant to discuss attendance issues. According to Mr. Ledger, the meeting was called because claimant had missed a number of shifts throughout September and October 2020. Claimant has a non-work-related medical condition that required a significant amount of medical treatment towards the end of 2020. The employer was aware of claimant's medical condition.

During the October 15, 2020, meeting, Mr. Ledger reminded claimant that texting her co-worker was not a proper means of reporting an absence. Mr. Ledger instructed claimant that she would need to call in and speak with her supervisor when reporting an absence. Mr. Ledger also reminded claimant that if she was going to miss work for medical reasons she would need to bring in a doctor's note or medical excuse. Claimant told Mr. Ledger that she would bring in a doctor's note to excuse her most recent absence of October 14, 2020. Mr. Ledger testified he never received said doctor's note. Claimant disputes the accuracy of Mr. Ledger's testimony in this regard. According to claimant, she obtained a medical excuse from Broadlawns the very next day and handed it directly to Mr. Ledger.

As previously mentioned, claimant last worked for the employer on December 14, 2020. Claimant was scheduled to work on December 22, 2020, January 4, 2021, January 19, 2021, and January 28, 2021, but did not present to work for her shifts. The employer asserts claimant was a no-call/no-show on these dates. The employer further asserts claimant did not produce medical notes to excuse her absences for these dates. Claimant disputes the accuracy of the employer's testimony in this regard. Claimant testified that she provided the employer with proper notice and/or a doctor's note excusing her from work on December 22, 2020, January 4, 2021, January 19, 2021, and January 28, 2021. Claimant testified that she kept Nikki Waldron, an HR representative, up to date with respect to all of her medical appointments and anticipated absences.

There appears to be some confusion with respect to the reporting of absences. According to Mr. Ledger, claimant was to report all anticipated absences directly to him. Claimant was also supposed to present any medical notes or work excuses to Mr. Ledger. However, claimant was under the impression that Mr. Ledger wanted her to contact Ms. Waldron directly with any questions, comments, or concerns regarding her schedule. Claimant believed she could report her absences to Ms. Waldron. Claimant testified that she routinely attempted to contact Ms. Waldron through telephone calls, voicemails, and e-mails; however, Ms. Waldron was largely unresponsive. Claimant further testified that she sent in or faxed her medical records to Ms. Waldron.

The evidentiary record contains a single medical excuse, signed by Keith Hanson, D.O., and dated December 22, 2020. The note provides claimant was excused from work on December 22, 2020, and that she could return to full physical activity on December 23, 2020.

Claimant acknowledged that she missed her shift on January 4, 2021; however, she testified that she had another employee cover her shift for her.

Lastly, the evidentiary record contains an electronic correspondence, dated January 12, 2021. In the e-mail, claimant notified the employer that she would not be able to work on Tuesday, January 19, 2021, as she was going to be in Iowa City, Iowa for an orthopedic appointment.

Claimant provided no explanation as to why she missed her shift on January 28, 2021.

Mr. Ledger testified claimant's personnel file only contained a single doctor's note/medical excuse, and it was dated January 3, 2019.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code §96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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).

First it must be determined whether claimant quit or was discharged from employment.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Claimant had no intention to quit. In fact, claimant had requested to work more hours for the employer in December 2020. There was not an overt act of carrying out any intention to quit by claimant. Moreover, the evidentiary record reveals claimant, at the very least, was not a no call/no show for her January 19, 2021, shift. As such, this case must be analyzed as a discharge.

Because claimant was discharged from employment, the burden of proof falls to the employer to establish that claimant was discharged for job-related 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." 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, the employer incurs potential liability for unemployment insurance benefits related to that separation.

Iowa Admin. Code r.871-24.32(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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id*. at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). 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." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds claimant to be a credible witness. Claimant's testimony was reasonable and largely consistent with the exhibits she submitted into evidence. Her statements were consistent and convincing.

In this case, the undersigned must analyze four potential absences. Claimant was scheduled to work on December 22, 2020, January 4, 2021, January 19, 2021, and January 28, 2021, but did not present to work for her shifts.

Again, 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. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

I find the December 22, 2020, and January 19, 2021, shifts were properly reported or excused under Iowa law.

While the December 22, 2020, work excuse does not indicate that it was faxed or provided to the employer, it supports a finding that claimant actually had a medical appointment on December 22, 2020. It further indicates claimant at the very least requested a work excuse with the intent of providing the same to her employer. I find claimant faxed or presented the same to Ms. Waldron and/or Mr. Ledger.

I further find claimant provided notice that she would not be available to work her January 19, 2021, shift, due to a medical appointment in Iowa City, Iowa. Claimant provided notice of her January 19, 2021, medical appointment on January 12, 2021.

The January 4, 2021, absence is a bit more complicated. Claimant credibly testified that she had another employee cover her shift for her so that she could leave early in the morning and drive to her medical appointment on the morning of January 5, 2021. Claimant further testified that she provided the employer with a doctor's note for this absence. Claimant did not upload or produce evidence of the same. Claimant testified that she had technical difficulties with the Appeals Bureau's website as the reason she could not produce more than three documents for the evidentiary hearing. Ultimately, I accept claimant's testimony that she reported the medical appointment to the employer prior to her absence on January 4, 2021. It is possible this was still considered an unexcused absence by the employer; however, under Iowa law such an absence does not constitute work-connected misconduct. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 558 (Iowa Ct. App. 2007).

Little to no testimony was provided regarding the January 28, 2021, absence. As such, I find that the January 28, 202, absence was an unexcused absence. Nevertheless, I do not find this single unexcused absence to be excessive.

In this case, claimant missed three shifts between December 22, 2020, and January 19, 2021, for out-of-town medical appointments. I found claimant to be a credible witness and accept her testimony that she properly reported the same to the employer. The evidentiary record supports claimant's testimony with respect to the December 22, 2020, and January 19, 2021, absences. I relied on claimant's credible testimony to find claimant properly reported the January 4, 2021, absence. In this case, there is no evidence to support a finding that the January 28, 2021, absence was excused. As such, I find that there was one absence that was unexcused. I do not find this single unexcused absence to be excessive.

The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify her from receiving benefits. Benefits are allowed.

DECISION:

The March 15, 2021, (reference 04) unemployment insurance decision is reversed. Claimant did not voluntarily quit her employment; rather, claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Michael J. Lunn
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

June 21, 2021
Decision Dated and Mailed

mjl/kmj