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

ANGELIA M ALVAREZ
Claimant

APPEAL NO. 13A-UI-09536-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARKETLINK INC
Employer

**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 5, 2013, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 24, 2013. Claimant participated. Employer participated through sales manager Louise Bradley and human resources generalist Shayleen Houston.

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 full-time as a telephone sales representative (TSR) and was separated from employment on July 15, 2013, when she reported for work. Her last day of work was July 2, 2013. She was hospitalized from July 3 through Saturday, July 6, and called Bradley about her mother-in-law's death on July 4, and arranged bereavement leave for July 8, 9 and 10. Her husband was already in Chicago and funeral arrangements were not made until claimant arrived. She called Bradley on July 9, to ask for an extension of the leave because the funeral was not scheduled until Saturday, July 13, 2013. The parties dispute whether Bradley agreed to the extension of leave and told her to bring documentation. When claimant returned to work on July 15, she brought a letter from funeral home and the obituary. She was discharged for missing work on July 11 and 12. She had been warned in writing on December 27, 2012, about absenteeism. Other absences included March 22, 2013 (left early for doctor's appointment); November 19, 20, 21 (ear infection) ; 23 (requested off but had no leave because of using PTO on 19th due to illness and ear infection); 29 (doctor appointment); 29 (court appearance as the victim); December 8 (left early police were at her house because her husband was in a fight); December 19 (tardy, mother in hospital); December 20 (make up time not completed due to snow); 26 (ill); and 30, 2012 (left early coughing).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged 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(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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. A failure to report to work at the end of a leave period is generally considered an unexcused absence. However, the parties dispute whether Bradley gave claimant permission to be absent two more days for her mother-in-law's funeral. Because there was unclear communication between claimant and employer about the interpretation of both parties' statements about the status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. Since most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Given that claimant reported to work on Monday with her documentation as she said Bradley

requested, her testimony is credible when it departs from Bradley's recollection of the conversation. Because claimant's absences, including the last absence, were related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed.

DECISION:

The August 5, 2013, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/pjs