IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MORGAN L HOLT Claimant **BEATON INC** Employer	**APPEAL 17A-UI-10899-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/26/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 12, 2017, (reference 02) unemployment insurance decision that allowed benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 9, 2017. Claimant participated. Employer participated through controller Kathy Frerichs and district manager Michelle Peska. Employer's Exhibit 1 was received.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer in March 2017. Claimant last worked as a full-time shift supervisor. Claimant was separated from employment on September 16, 2017, when she was discharged.

Employer has an attendance policy. The policy requires employees to request time off in advance. If employees cannot attend a scheduled shift they should attempt to find a replacement and contact a manager prior to the beginning of the scheduled shift. Claimant was aware of the policy.

Claimant was made aware she would have to work weekends when she began in the position.

On April 23, 2017, claimant had a no-call/no-show absence. She was given a verbal warning.

On July 5, 2017, claimant had a no-call/no-show absence.

On July 14 and 16, 2017, claimant missed work due to a medical emergency.

On September 3, 2017, claimant was scheduled to work from 5:00 a.m. until 3:00 p.m. Claimant asked her manager, Betty Carlson, to work for her from 5:00 a.m. until 10:00 a.m. so claimant could attend a soccer game in Chicago. The night before the shift claimant called Carlson and stated she would not be in at all the next day because the soccer team progressed in its tournament. Claimant did not appear for work.

On September 14, 2017, claimant agreed to help out by covering a shift that ran from 9:00 a.m. until 3:00 p.m. Claimant came in at 10:15 a.m. and left at 1:00 p.m. Carlson was upset when claimant left, but claimant stated she had plans at 2:00 p.m. and she would not break them.

On September 16, 2017, claimant was scheduled to work at 10:00 a.m. until 3:00 p.m. On September 15, 2017, claimant informed Carlson she would not be in the next day as she did not have a babysitter for her children and her husband was busy coaching soccer. Claimant did not appear for work and was terminated via text message on September 16, 2017.

REASONING AND CONCLUSIONS OF LAW:

As a preliminary matter, the administrative law judge concludes the claimant was discharged from employment and did not resign. Employer contends claimant had a no-call/no-show absence on September 16 and never reappeared for work. Claimant contends she was terminated via text message by manager Betty Carlson. Carlson did not testify at the hearing. Because claimant was a firsthand witness, I find her testimony more credible than employer's contentions and find claimant was terminated and did not abandon the job.

For essentially the same reason, I find employer failed to establish claimant was terminated for job-related misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

In this case, claimant had several unexcused absences. However, employer failed to establish it disciplined claimant for her conduct and made her aware her job was in jeopardy if it continued. While employer did establish that it warned claimant about a no-call/no-show absence in April 2017, none of the other disciplinary actions presented as Exhibit 1 were signed by claimant. Claimant testified she was not disciplined for her continued absenteeism, which included another no-call/no-show absence in July and general unreliability in September. Employer claims claimant was warned regarding these incidents even though claimant did not sign the documentation, but failed to present any of the witnesses who gave these alleged warnings. Therefore, again, I find the claimant's testimony as a firsthand witness more credible than employer's and find claimant had no notice from employer that her job was in jeopardy or that one more absence would result in termination.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Here, employer did not give claimant that notice. Instead, it allowed claimant to continue to engage in the conduct until one day it suddenly terminated her employment.

Employer has failed to establish claimant was terminated for job-related misconduct. Therefore, benefits are allowed and the issues regarding overpayment are moot and will not be discussed further in this decision.

DECISION:

The October 12, 2017, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____

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

_____

Decision Dated and Mailed

cal/rvs