IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SARA W FELTON Claimant **HY VEE INC** Employer	**APPEAL 16A-UI-05700-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/1/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 17, 2016 (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on June 8, 2016. The claimant, Sara W. Felton, participated personally and through witness Debra Eidschun. The employer, Hy-Vee, Inc., participated through Hearing Representative Judy Berry; Store Director Tim Flaherty; and Human Resource Manager Sue Hirschman. Employer's Exhibits One through Three were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a bakery clerk. She was employed from September 20, 2014 until May 2, 2016. Claimant's job duties included wrapping finished product, assisting customers, and filling daily orders. Kurt Kuiper was her immediate supervisor.

On April 25, 2016, claimant was contacted by her mother, Ms. Eidschun, and was told that she was having medical problems with a recent medical test she had completed and needed to see a doctor. Ms. Eidschun then came to claimant's work so that she could drive her to the emergency room.

Claimant had discussed leaving early with her supervisor Mr. Kuiper in the morning. Claimant was told that she would need to finish her work and he would see what he could do about her leaving early. Claimant finished her work at approximately noon and approached Mr. Kuiper as he was having his lunch. She stated that she had finished her work and that she needed to take her mother to the doctor. Ms. Eidschun was present when the conversation between Mr. Kuiper

and claimant occurred. Mr. Kuiper responded in an angry tone "go, just go then" to the claimant. Claimant believed she had permission to leave and did so at that time. Mr. Kuiper did not tell claimant that her job was in jeopardy if she left.

The employer has written policies for its store. See Exhibit One. The written policy states in pertinent part that "excessive tardiness or absences will result in the employee being terminated. You are responsible for your shifts and your job. If there is any reason you cannot work, you are required to find someone to work for you. If you cannot find anyone, you will be expected to be here, or it will be considered an absence from work." See Exhibit One.

Claimant was ill and did not work on April 26, 2016; April 28, 2016; April 29, 2016; and April 30, 2016. She did properly report to her supervisor that she would not be able to work due to illness. Her absences on those dates did not play a role in Mr. Flaherty's decision to discharge her from employment. Prior to this incident the claimant had no verbal or written discipline of any kind during her employment with the company.

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. Benefits are allowed.

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 and (4) 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).

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted).

If the record is composed of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Neither Mr. Kuiper nor Ms. Erickson testified at the hearing but rather submitted written statements. By failing to testify they were not subject to cross-examination. It is permissible to infer that verbal testimony was not submitted because it would not have been supportive of employer's position. See *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

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 her own common sense and experience, the administrative law judge finds claimant's direct testimony and Ms. Eidschun's direct testimony of events more credible than the employer's reliance on hearsay statements from Mr. Kuiper and Ms. Erickson. Both claimant and Ms. Eidschun testified that Mr. Kuiper gave claimant permission to leave that day. While Mr. Kuiper's statement does not say that he gave her permission, he did not testify and was not subject to cross-examination. Further, both claimant and Ms. Eidschun testified that claimant did not make any statements that she did not care whether or not she got in trouble for leaving. I find claimant and Ms. Eidschun's direct testimony more credible than the hearsay statements submitted as Employer's Exhibits One and Two.

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, employer incurs potential liability for unemployment insurance benefits related to that separation. Claimant never received any previous discipline prior to the April 25, 2016 incident for which she was discharged for.

Employer's own policy does not state that an employee will be subject to discharge for walking off the job. Rather, employer's own policy states that if an employee does not find a replacement and they are not at work, *it will be considered an absence*. (emphasis added). Employer's policy goes on to further state that *excessive* tardiness or absences will result in the employee being terminated. While claimant was absent the following four shifts, those absences were properly reported due to illness. Claimant's one absence on April 25, 2016 is not excessive.

Excessive absences are not considered misconduct unless unexcused. *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); *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. 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. It can also be unexcused because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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. *Higgins*, 350 N.W.2d at 190. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 at 10-11. Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

In this case, claimant's absence on April 25, 2016 was excused because she received permission from her direct supervisor to leave. Even assuming that claimant's absence on April 25, 2016 was not excused because she failed to find a replacement worker, one absence

is not excessive. Excessive absenteeism has been found when there has 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.*, 321 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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. In this case, one unexcused absence is not excessive.

Employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. In this case Mr. Kuiper did not state that claimant could not leave or if she did leave she would be subject to discipline, including discharge. He said, "Go, go ahead and go then". Claimant believed she had her supervisor's consent to leave. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. 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. Benefits are allowed.

DECISION:

The May 17, 2016 (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/can