IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHANNON DREVYANKO
Claimant

CAR FRESHNER CORPORATION
Employer

APPEAL NO: 16A-UI-09739-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/14/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 29, 2016, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 23, 2016. The claimant participated in the hearing. The employer provided a phone number prior to the hearing but was not available at that number at the time of the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time machine operator for Car-Freshner Corporation from July 6, 2015 to August 15, 2016. She was discharged for exceeding the employer's allowed number of attendance points.

The employer's attendance policy assesses .25 point for an absence of two hours or less; .50 point for an absence of two hours but less than one-half day; .75 point for more than one-half day but less than a full day; and 1.00 for a full day absence of 10 hours. The employer does not issue any attendance warnings.

On September 28, 2015, the claimant was tardy and received .25 point because her son fell and she had to take him to the emergency room; on October 15, 2015, there was an early out and the claimant received .50 point; on December 3, 2015, her husband underwent an upper gastrointestinal scope and she needed to stay home with him and received 1.00 point; on December 15, 2015, the claimant's husband had a colonoscopy and she needed to take him to his appointment, provided a note and received 1.00 point; on January 14, 2016, the claimant had a sinus infection and received 1.00 point; on February 2 and April 19, 2016, the claimant had lab tests done and received .25 point for each occurrence; on May 23, 2016, the claimant missed a portion of the day but does not recall the reason and received .50 point; on June 22,

2016, the claimant was on vacation for half of the day and received .50 point; on June 23, 2016, the claimant was on vacation and received 1.00 point; on July 6, 2016, the claimant punched in one minute late and received .25 points; and on July 18, 2016, the claimant left early because she was ill and received .75 point.

At the time of hire the claimant told the previous human resources manager she needed the week of June 20, 2016, off for a pre-scheduled family vacation and it was approved. The new human resources manager told the claimant she needed to use her vacation and then sick leave that week and the claimant received .50 point for June 22 and 1.00 point for June 23, 2016.

The claimant notified the employer July 28, 2016, her children had back to school physicals and dental appointments Friday, August 5, 2016. Her direct supervisor notified her they would be working mandatory overtime during the month of August 2016 and the only way the claimant's absence would be excused August 5, 2016, was if the absence pertained to the claimant herself. The claimant asked if she could use vacation time and was told she could not do so because she had not filed for vacation before mandatory overtime was announced. The claimant was on intermittent FMLA July 25 through July 27, 2016, and returned July 28, 2016. She made the medical and dental appointment for her children while off work and was not aware of the mandatory overtime until she returned to work July 28, 2016.

On August 15, 2016, the employer notified the claimant she exceeded her allowed 8.00 attendance points by .25 points August 5, 2016, and her employment was terminated.

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 § 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(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.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

The claimant incurred 1.00 point for her absence August 5, 2016, when she took her children to have school physicals and dental appointments, for a total of 8.25 points. She did not know the employer would be imposing mandatory overtime for the month of August 2016 when she made the appointments. She could have provided doctor's excuses for her absence but the employer would only excuse the absence if it was for the claimant's own illness. Additionally, the employer would not allow the claimant to use vacation to cover her absence.

Seven of the claimant's 8.25 absences were attributable to properly reported illness of herself, her husband, or her children or use of vacation for a previously scheduled and approved vacation.

Finally, the claimant's last absence occurred August 5, 2016, but the employer waited until August 15, 2016, to terminate her employment. The employer knew or should have known the claimant went over her allowed point total August 5, 2016. Consequently, the claimant's last absence was not a current act of misconduct.

While the claimant did exceed the employer's allowed number of attendance points, the vast majority of those absences were due to properly reported illness and her last absence was not a current act of misconduct. Because the final absence was related to scheduled school physicals and dental appointments for her children before she knew of the mandatory overtime, no final or current incident of unexcused absenteeism has been established. Therefore, benefits are allowed.

DECISION:

The August 29, 2016, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs