IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KATHLEEN L BERGIN
Claimant

DOLGENCORP LLC
Employer

APPEAL NO. 13A-UI-05974-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/14/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the May 6, 2013 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 26, 2013. Claimant participated. Employer participated through district manager, Cylas Hall and leave administration/compliance supervisor, Becky Cherry. Proposed witness Penny Tipton was not available at the number provided and did not participate.

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 an assistant manager and was separated from employment on April 25, 2013. Her last day of work was February 21, 2013 when store manager Penny Tipton fired her after she called in due to weather. Her street and the main road, Hamilton, were blocked off due to snow and accidents. Schools were closing due to weather conditions. Schools were being closed and streets were closed due to accidents. Claimant was eight months pregnant and had never been warned about attendance. Tipton called her repeatedly over the course of a week to return her keys. She dropped them off at another store. Tipton has the authority to hire and fire.

She received correspondence on February 25 wanting more information about her request for a Family Medical Leave Act (FMLA) maternity leave of absence. A February 28 letter requested more information. An April 9 letter denied leave from February 23 to March 20 but allowed leave from March 21 through May 1. A March 22 letter from Hall that advised the leave of absence was unapproved and she must call within ten days or she would be terminated. Claimant was in the hospital from March 21 through 24 after having her baby. She did not call because she thought she was fired. She filed a claim for benefits on April 14. On April 17 Hall spoke with claimant about returning to work on May 2 and asked if she wanted to relocate to another store closer to her home. If she returned, she would be a lead sales associate, a

supervisor position, but would not be an assistant manager. Her pay would remain at $10.00 per hour. On April 18 Hall received the notice of claim from IWD. Still has available work and is eligible for rehire at any location.

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.

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). 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).

Since Tipton had the authority to fire claimant, she reasonably believed her employment had involuntarily ended and she is not obligated to accept an offer to return to work. A failure to report to work because of severe weather conditions when roads are closed may be considered an excused absence. Even if it were not, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. No final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it 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. 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. Benefits are allowed.

DECISION:

The May 6, 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.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css