IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNIFER E FRANCK Claimant **MERCY MEDICAL CENTER** Employer	**APPEAL 18A-UI-03206-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/31/17** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant, Jennifer E. Franck, filed an appeal from the March 5, 2018, (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 5, 2018. This hearing is consolidated with 18A-UI-03207-JC-T. The claimant participated personally. The employer participated through Christine Gust, senior human resources generalist. Les Eischeidt, supervisor of environmental services, also testified. Employer Exhibits 1-4 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did the claimant voluntarily quit the employment with good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a utility worker in environmental services and was separated from employment on December 25, 2017, when she was discharged for excessive absenteeism.

During the hiring process and upon hire, the claimant was trained on the employer's attendance policies (Employer Exhibits 3, 4) which require an employee call a designated phone number at least one hour prior to their shift start time. The claimant's manager, Justin, hand entered the contact number into the claimant's phone when she was in training. The claimant also wore an id badge with her name and picture on it. On the backside was the employer's general phone number printed on it. The general phone number is operated 24 hours a day by the employer.

The employer's attendance policy is a no-fault point based one, which designates point values for attendance infractions, regardless of reason, and upon receipt of 24 points in a six month

period, an employee can be discharged. The employer does reduce points for consecutive absences properly reported for illness.

During the claimant's six weeks of employment, the claimant was tardy on November 17, 29, December 18 and 19, 2017. She was absent November 28 and December 1, 2017. The claimant attributed her absences and tardies to unknown reasons, for oversleeping and reportedly experiencing complications from a mandatory flu shot she had to get for employment. According to the claimant she was "sick the entire time she worked for the employer." She attributed her final tardies to being sick due to the "state of mind that I was in". The claimant properly reported her absences on November 28, 2017 and December 1, 2017 after reportedly discovering the designated phone number she was provided was invalid. The claimant was then issued a warning on December 19, 2017, that her job was in jeopardy due to attendance points.

On December 23, 2017, the claimant was a no-call/no-show for her shift. The claimant stated she was sick and later diagnosed with walking pneumonia. The claimant reported she attempted to call the phone number in her phone (though she stated she thought it was invalid) and could not get through. The claimant did not call the general phone line for the employer, as listed on the back of her photo id badge or make any other attempts to leave a message for her manager or the employer to report her intended absence. If an employee is absent, they receive four points, but if they are a no-call/no-show, they receive 16 points. Because the claimant did not make any contact with any employer phone line on December 23, 2017, her absence was considered a no-call/no-show, which would have led to her pointing out. On December 25, 2017, she reported to work and was told by the manager on duty that she would be fired the following day for her no-call/no-show. So the claimant discontinued reporting for work on December 26 or 27, 2017. The employer disputed the claimant was informed by the manager on duty that she was being fired, but agreed that once the employer had taken time to review the claimant's no-call/no-show on December 23, 2017, she would have pointed out and been discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 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).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

In the specific context of absenteeism the administrative code provides:

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.

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). 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).* Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* The claimant in this case acknowledged she had at least one tardy due to oversleeping and her final absence was due to illness which was not properly reported. Even if the other absences are not considered, the claimant had at least two unexcused absences in a six week period, including her final absence.

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007). The claimant in this case had a total of seven absences, in a six week period and at least two were unexcused. Under these circumstances, the administrative law judge concludes the claimant had excessive absences.

The administrative law judge is persuaded the claimant was aware of the employer's policies which required she notify the employer of an intended absence in advance by calling a designated number. The employer credibly testified it takes multiple steps to ensure employees have access to its phone numbers, including having the claimant's manager hand-program the phone number into her phone, and even placing a general phone number on the back of each employee's badge that allows them to call the medical center 24 hours a day and reach a live person. The claimant was responsible for having an available phone number to report, in case she was absent.

The claimant reported the employer phone number provided for her to call was not working when she called on December 23, 2017 and that is why she did not report her final absence. The employer reported no other employee had issues calling the phone number and believed it was working on December 23, 2017, when the claimant was absent. If for some reason the claimant's contact entry for the employer was incorrectly listed on her phone, she acknowledged she knew that before her final absence and had a responsibility (especially in light of the December 19, 2017 warning) to make sure she had a correct phone number available in case she was absent again. At a minimum, the claimant could have called the generic phone line located on the back of her id badge to relay a message of her absence.

Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The March 5, 2018, (reference 03) decision is affirmed. The claimant was discharged for disqualifying misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn