IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LYNN M HILDEBRANT Claimant **KRAFT HEINZ FOODS COMPANY** Employer	**APPEAL 16A-UI-12567-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/30/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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/appellant filed an appeal from the November 16, 2016 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 12, 2016. The claimant, Lynn M. Hildebrant, participated personally. The employer, Kraft Heinz Foods Company, participated through Human Resources Generalist Rachel Przybylek. Employer's Exhibits 1 through 8 were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance record including the fact finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 was employed full-time as production team member working in the sanitation department. She was employed from May 11, 2015 until October 28, 2016 when she was discharged. Her job duties included sanitizing machines for the production floor of the factory. Claimant's immediate supervisor at the time of discharge was Jessica Triphahn.

The employer has a written policy in place regarding absenteeism. See Exhibit 1. The employer's absenteeism policy changed in February of 2016. Claimant was notified of the change and received a copy of the new written policy. The new written policy states that an employee is subject to discharge if they reach 14 points. See Exhibit 1. The employee will also be given a written warning if they reach 12 points. See Exhibit 1.

The claimant was discharged for absenteeism. The final incident leading to discharge occurred during claimant's October 27, 2016 shift, beginning at 2:00 p.m., when claimant was absent from work.

Claimant had been previously scheduled to work third shift (10:00 p.m. to 6:30 a.m.) on October 26, 2016. Claimant arrived tardy to work and clocked in at 12:27 a.m. on October 27, 2016, meaning that she was two hours and twenty seven minutes late for her shift. At this time she was told by Ms. Triphahn that her schedule was being changed and she was to report back for second shift, which began at 2:00 p.m. that same day, October 27, 2016. Claimant was told by Ms. Triphahn that she could finish the shift that she reported to or leave. Claimant chose to leave. Claimant did not report back for the 2:00 p.m. shift on October 27, 2016 because she had three minor children at home for which she did not have child care for. She was unable to secure care for her children because she is a single mother and she was given less than 14 hours of notice of the change in her scheduled shift hours. She discussed this problem with her supervisor and the fact that she could not report to work at 2:00 p.m. on October 27, 2016 but her supervisor had no meaningful response. Claimant did not report to work at 2:00 p.m. on October 27, 2016.

Claimant returned for her 2:00 p.m. shift the next day, Friday, October 28, 2016. At this time claimant was told that she was no longer employed and had been discharged for absenteeism.

Prior to October 27, 2016 claimant had several days where she was absent from work for various reasons. See Exhibit 5. She did call and report her absences on each occasion pursuant to the employer's written policy. When claimant was discharged she had accumulated 27.5 points under the employer's written policy. See Exhibit 5.

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 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and 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.

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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id*. at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. 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. *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 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). 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 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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 (Iowa 1984). 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 N.W.2d at 10-11 (Iowa 1982). 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*.

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. 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).

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 testimony regarding the conversation she had with Ms. Triphahn credible.

It is clear that the final act that the employer relied upon for claimant's discharge was the October 27, 2016 2:00 p.m. shift absence since she was not discharged when she reported to

work late for her October 26, 2016 shift and was told that she would be transferred to a different department and could go home. Because claimant was told that she could go home for her October 26, 2016 shift, this is not an unexcused absence.

Claimant was told to return at 2:00 p.m. on October 27, 2016 for a second shift. Claimant explained to Ms. Triphahn that she did not have enough notice to make babysitter arrangements for her three minor children in order to allow her to come in to work at 2:00 p.m. on October 27, 2016. Claimant was able to make babysitter arrangements for her three minor children beginning the following day on Friday, October 28, 2016; however, she was discharged before she could start working.

Claimant's absence from her shift beginning October 26, 2016 was because her supervisor told her she could go home. Claimant's absence from her 2:00 p.m. October 27, 2016 shift was for other reasonable grounds (failure to secure childcare when only receiving less than 14 hours-notice) and was properly reported to her supervisor. As such, there is no current act of misconduct that the claimant engaged in which would disqualify her from receiving benefits. Because there was no current act of misconduct, there is no need to review claimant's previous absenteeism record.

The employer has failed to establish that the claimant was discharged for a current act of job-related misconduct which would disqualify her from receiving benefits. Benefits are allowed. Because benefits are allowed the issues of overpayment and chargeability are moot.

DECISION:

The November 16, 2016 (reference 01) unemployment insurance decision allowing benefits is affirmed. 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

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