IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WILLIAM G WITTSTOCK Claimant **CENTRAL IOWA POWDER COATING INC** Employer	**APPEAL 22A-UI-06031-DH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/13/22** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules
Iowa Admin. Code r. 871-24.32(7) - Excessive Unexcused Absenteeism
Iowa Admin. Code r. 871-24.32(8) - Current Act

STATEMENT OF THE CASE:

The employer/appellant, Central Iowa Provider Coating, Inc., filed an appeal from the March 4, 2022, (reference 01) unemployment insurance decision that allowed benefits as the 01/24/22 dismissal for excessive absences was for properly reported illnesses and therefore no misconduct. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for April 18, 2022. The claimant, William Wittstock did not participate. The employer participated through John Platt, president and owner. Judicial notice was taken of the administrative record.

ISSUE:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?

Was the claimant overpaid benefits?

Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds: Claimant started with employer in March 28, 2019 as a fulltime general laborer with a set schedule. His last day worked was February 20, 2022. Claimant timely called into work regarding a personal illness on February 24, 2022 and was discharged, on the same date for excessive absences, as he no longer had leave time left.

Employer has an employee handbook and claimant was given access when she started work. There are policies regarding attendance and a point system that when an employee accumulated 5 points in a rolling 6-month period, they are eligible for discharge from employment.
Employer testified as to the below absences being factored into the discharge:

Points	Total	Date	Absence / Incident
		02/03/22	DISCHARGE
2	7	02/02/22	No Call No Show
3	5	11/20/21	No Call No Show (thanksgiving time) & unexcused
1	2	09/23/21	Called in – no other information
1	1	08/25/21	Called in – no other information

The September and August events were claimant calling in sick, in a timely manner to report she was not coming into work. Claimant disputes she no called no showed in February. Claimant two other incidents employer did not utilize, then realized those points fell off in the rolling six-month period prior to February 2022.

Records show claimant has received $3,288.00 in benefits for the eight weeks from 02/12/22 through 04/02/22, with her weekly benefit amount being $411. Employer submitted documents for fact-finding but did not participate in the telephone interview. Per the definitions, employer did participate in fact finding. See Iowa Admin. Code r. 871-24.10(1).

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 section 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(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.

Iowa Admin. Code r. 871-24.1 provides:

> Definitions.
>
> Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.
>
> 24.1(113) *Separations.* All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> c. *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

To the extent that the circumstances surrounding each incident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only

"inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

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. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer has failed to prove they had previously warned claimant about any 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.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000).

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). 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. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

Second, the absences must be unexcused. *Cosper* 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* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

The employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that claimant was warned additional points could result in termination of employment, however, for unemployment purposes, absences dealing with claimant's personal illness/injury were timely report and excusable for unemployment benefit purposes.

Absences must be unexcused. Employer treats all absences listed as a no-fault. For purposes of unemployment, the personal illness of claimant that are properly reported are considered an excused absence. As such, the incidents of 09/23/21 and 08/25/21 cannot be factored, employer had no information beyond claimant called in while claimant advised she timely reported personal illness. This results in five points bringing the new total to five, having the chart now looks like this:

Points	Total	Date	Absence / Incident
		02/03/22	DISCHARGE
2	5	02/02/22	No Call No Show
3	3	11/20/21	No Call No Show (thanksgiving time) & unexcused

While five points are within the policy and while employer may have had good reasons to let claimant go, two absences in six months is not excessive. As such, there was no disqualify reason proven and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

Because claimant is allowed benefits,

Because claimant's separation was not disqualifying, benefits were paid to which he was entitled, making the issues of overpayment, repayment, and employer's relief of charges moot and they will not be further addressed.

DECISION:

The March 4, 2022, (reference 01) unemployment insurance decision granting benefits is **AFFIRMED**. Claimant's discharge was not disqualifying and therefore benefits are allowed on this issue. This makes the issues of claimant's overpayment and repayment and employer's relief of charges moot.

Darrin T. Hamilton
Administrative Law Judge

April 26, 2022
Decision Dated and Mailed

dh/kmj