IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LESLIE N POTTER Claimant **NEWTON HEALTH CARE CENTER LLC** Employer	**APPEAL 15A-UI-12758-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 12, 2015 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 7, 2015. Claimant participated. Randall Schueller, Attorney at Law, also participated on her behalf. Employer participated through human resources manager Kim Bates and director of nursing Roz Drella.

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 a certified nursing assistant (CNA) from November 6, 2014 and was separated from employment on October 8, 2015; when she was discharged.

The employer has an attendance policy which applies point values to attendance infractions, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated and will be discharged upon receiving ten points. As a part of the attendance policy, the employer also has a no-call/no-show policy where if an employee has two no-call/no-shows, then the employee is deemed to have voluntarily quit. The days do not have to be consecutive. Employees are to call in at least two hours before their shift starts if they are going to be absent. The employer does not require doctor's notes, unless more than three consecutive days. Claimant was made aware of the employer's policy at the time of hire.

Claimant had two no-call/no-shows on September 30, 2015 and October 1, 2015. Claimant was deemed a voluntary quit after the October 1, 2015 no-call/no-show. Claimant was scheduled to work on September 30, 2015. Claimant did not show up for work. Claimant did not contact the employer and inform it she was going to be absent. The employer did not attempt to contact claimant. On October 1, 2015, claimant was scheduled to work. Claimant showed up for work after her shift had started. Claimant showed up at the employer at 2:00 p.m. but she was supposed to start work at noon. Claimant was not planning on working that day. Claimant just

brought in a doctor's note releasing her back to work on September 30, 2015. Claimant explained she was sick on September 30, 2015 and October 1, 2015. The employer did not ask for a doctor's note. Claimant was schedule to work October 3 and 4, 2015. On October 2, 2015, claimant texted Ms. Drella that she was at the hospital and would not be able to work on the weekend. Ms. Drella responded ok. Claimant was then scheduled to work on October 6, 2015. On October 6, 2015, Ms. Bates told claimant to not come in until claimant heard back from Ms. Drella. On October 8, 2015, the employer told claimant she was separated from employment.

In the month of September 2015 (not counting September 30, 2015), claimant worked September 2, 3, 4, 8, 9, 10, 11, 15, and 22, 2015. Claimant was absent from her shifts on September 14, 16, 17, 19, 20, 23, 24, 25, 28, and 29, 2015. Claimant provided a doctor's note excusing her from work from September 1, 2015 through September 29, 2015. Claimant provided this note on October 1, 2015. Claimant would have only had one point for September 2015 (not counting September 30, 2015) because of the doctor's note.

Claimant had five attendance points prior to September 2015. Claimant was not aware she was at five attendance points. Claimant had five points because of five absences. Claimant was absent on March 2, 2015 (claimant called in sick), March 7, 2015 (claimant called in sick), May 12, 2015 (claimant called in sick), July 1, 2015 (claimant's son was sick), and July 8, 2015 (claimant called in because of injury).

Claimant did not have a prior warning for attendance issues. The employer gives a verbal warning at six points. One no-call/no-show is eight points or a final written warning.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
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> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since the employer's policy provides for separation after two no-call/no-shows that do not have to be consecutive, instead of three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (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. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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* 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. 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, supra.*

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Claimant was discharged for having two no-call/no-shows in violation of the employer's policy. It is not in dispute that claimant failed report her absence on September 30, 2015. On October 1, 2015, claimant did not follow the employer's known call-in procedure to report her absence. Employees are required to call-in two before their shift begins, but claimant notified the employer two hours after her shift had started; this amounted to two absences that were not properly reported. On October 1, 2015, claimant did provide the employer with a doctor's note excusing all of her absences in September 2015, except for September 30, 2015, due to illness. Claimant followed the employer's call-in procedure for the majority of her September 2015 absences. Claimant's only other absences were on March 2, 2015, March 7, 2015, May 12, 2015, July 1, 2015, and July 8, 2015. Four of those absences were properly reported due to illness or injury. Therefore, after October 1, 2015, claimant had only three absences there were not properly reported due to illness or injury. Three absences, especially when claimant reported two of the three were because of illness (just not prior to her shift starting on October 1, 2015), are not considered excessive. It is clear from the claimant's recent history, she was having medical issues that were preventing her from working her shift. Claimant had a history of properly following the call-in procedure until her September 30, 2015 and October 1, 2015 absences. Claimant testified that she could not even get out of bed she was so sick. The employer's argument that claimant had other no-call/no-show(s) after October 1, 2015 is not persuasive. Claimant testified she was schedule to work October 3 and 4, 2015. On October 2, 2015, claimant texted Ms. Drella that she was at the hospital and would not be able to work on the weekend. Ms. Drella responded ok. Furthermore, claimant had never been warned that her job was in jeopardy or that she had attendance issues.

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.

The employer has also not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. A majority of claimant's absences were due to illness (a majority of which she properly reported), which are not considered unexcused. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

DECISION:

The November 12, 2015 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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