IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHRISTINA M DOCHTERMAN Claimant **GENESIS HEALTH SYSTEM** Employer	**APPEAL 15A-UI-11928-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/27/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 19, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 12, 2015. Claimant participated. Employer 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 a quality specialist from September 29, 2014, and was separated from employment on October 2, 2015, when she was discharged.

When claimant was hired in September 2014, the director of the physician group said that claimant's schedule was her own, that she could work from wherever she needed to and whatever hours she wanted to as long as she got her 40 hours a week, every week. The employer has an attendance policy, but it does not specifically apply to salaried employees with flexible schedules. Claimant was a salaried employee with a flexible schedule.

In July 2015, claimant was put into a 60-day corrective action plan because of her job performance. The corrective action plan required claimant to log on the work calendar whatever office she was working at. When the 60-day corrective action plan was completed at the end of September 2015, claimant was allowed to go back to her normal schedule without having to report on the work calendar where she was working at. On October 2, 2015, claimant was working from home, but did not put it on the work calendar. The interim director of the physician group told claimant that she should have put that on the work calendar. The interim director of the physician group told claimant that she had to do report on the work calendar where she was working from for one year from the date of the corrective action. The corrective action did not require claimant to report on the work calendar were she was working after the 60 days were completed. The interim director of the physician group told claimant because she did not report

where she was working at on October 2, 2015, it was considered a no-call/no-show. The interim director of the physician group discharged claimant for a no-call/no-show on October 2, 2015. Claimant never met with the interim director of the physician group after she completed the corrective action plan, until she was discharged. Claimant had no prior warnings for absenteeism. Claimant was never told her job was in jeopardy. Claimant was not told she needed to continue to follow the corrective action after the 60 days were completed.

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 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:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since claimant did not have 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:
>
> 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); 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. 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.

Ever since claimant was hired in September 2014, she had a flexible work schedule, both in location and hours. Claimant was allowed to work at various employer locations or from home and to control the hours of when she worked as long as she worked at least 40 hours a week. In July 2015, claimant received a 60-day corrective action plan because of her job performance. The corrective action plan only required her to report where she was working on the work calendar. Claimant was not told her job was in jeopardy. Claimant completed the corrective action plan at the end of September 2015. Claimant received no disciplinary violations during the 60-day corrective action plan. Because the corrective action plan had been completed, on October 2, 2015, claimant did not record on the work calendar that she was working from home. Even though she was no longer required to record where she was working at, the interim director of the physician group treated claimant as a no-call/no-show on October 2, 2015, for not recording on the work calendar that she was working from home. Claimant was discharged for one no-call/no-show. Claimant had no prior disciplinary warnings for absenteeism.

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. Furthermore, the employer has not

established that claimant had excessive absences (one unexcused absence is not considered excessive) which would be considered unexcused for purposes of unemployment insurance eligibility. Benefits are allowed.

DECISION:

The October 19, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs