IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANDREA M ASKINS Claimant **MILLER ORTHOPEDIC AFFILIATES PC** Employer	**APPEAL 19A-UI-05341-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/02/19** **Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Miller Orthopedic Affiliates (employer) appealed a representative's June 27, 2019, decision (reference 01) that concluded Andrea Askins (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 29, 2019. The claimant was represented by Greg Greiner, Attorney at Law, and participated personally. The employer participated by Melissa Battershell, Human Resources Accountant; Victoria Tarascio, Administrator; and Amy Keyes, Clinic Manager. The administrative law judge took official notice of the administrative record. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 12, 2018, as a full-time receptionist. She signed for receipt of the employer's handbook on June 12, 2018. The handbook stated that a person who accrued nine attendance points in a rolling twelve months would be terminated.

The claimant properly reported absences due to illness on June 22, July 11, 17, August 21, October 8, 23, December 27, 2018, January 28, February 22, and April 1, 2019. She provided doctor's notes for most of her absences. On January 29, 2019, and February 25, 2019, the employer issued her written warnings for accruing attendance points. On April 2, 2019, the employer issued her a three-day suspension for accruing eight attendance points. The warning indicated that further infractions could result in the claimant's termination from employment.

On May 22, 2019, at approximately 1:00 a.m. the claimant was notified that her son and his fiancée were involved in a vehicle accident. The fiancée was killed on impact. Her son was transported to a hospital in Evansville, Indiana. The claimant immediately prepared herself to go to work to request permission for time off. Her supervisor told her to speak with the

administrator. The administrator sent her a text saying, “OK…Please know we are all thinking of you”. The claimant started driving to Indiana. While she was driving, the administrator called her and terminated her employment for being absent from work and accruing a ninth attendance point.

The claimant filed for unemployment insurance benefits with an effective date of June 2, 2019. The employer participated personally at the fact finding interview on June 21, 2019, by Melissa Battershell and Victoria Tarascio.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.
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> 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(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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). In this case all of the claimant's absences, except for the final absence, were properly reported and due to illness. Those absences are not considered misconduct.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported absence which occurred on May 22, 2019. The claimant's soon to be family member was killed and her son was in the hospital in another state. The claimant's single incident does amount to job misconduct. A parent's presence with their child in such a circumstance has no wrongful intent. The claimant was discharged but the employer has not proven misconduct. Benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The representative's June 27, 2019, decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs