IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JESSICA L FAIRBANKS Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 20A-UI-01855-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/02/20** **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:

On February 28, 2020, Casey's Marketing Company (employer) filed an appeal from the February 21, 2020 (reference 04) unemployment insurance decision that determined Jessica Fairbanks (claimant) was eligible to receive unemployment insurance benefits.

A telephone hearing was held on March 17, 2020. The parties were properly notified of the hearing. Employer participated by Store Manager Renee Harper-Zeiner. Claimant participated personally.

Employer's Exhibits 1-3 were admitted. Claimant's Exhibits 1 was admitted. Official notice was taken of the administrative record.

ISSUE(S):

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

II. Was the claimant overpaid benefits? Should claimant repay benefits or should employer be charged due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a part-time store team member. Claimant's first day of employment was July 17, 2019. The last day claimant worked on the job was January 25, 2020. Claimant's immediate supervisor was Harper-Zeiner. Claimant typically worked the overnight shift, starting at 11 p.m. Claimant separated from employment on February 2, 2020. Claimant was discharged by Harper-Zeiner on that date.

Claimant was discharged due to absences on January 23, 29, and 30. Employer's Exhibit 3. Employer's written attendance policy directs employees to contact a manager/supervisor as far in advance as possible when absent from scheduled working hours. Employer's Exhibit 1. However, Harper-Zeiner had directed employees to call at least four hours in advance and considered a failure to do so a "no-call, no-show" absence.

Claimant was diagnosed with influenza on January 28, 2020. However, claimant knew it was difficult to find coverage for the overnight shift she worked, wanted to prove her reliability, and therefore wanted to try to continue working through her illness. As such, she did not initially report her illness to Harper-Zeiner and attempted to continue working.

Claimant was absent on January 29 and 30, 2020. On January 29, claimant was supposed to train on making doughnuts at 11 p.m. She called in sick approximately 20 minutes before her scheduled start time when it became clear that she was not going to be able to work that night. On January 30, claimant was preparing to go to work when she realized she was still too ill to work. Claimant called in approximately 10 minutes prior to her scheduled start time. Claimant called Harper-Zeiner to report her absence and for the first time reported she had been diagnosed with influenza.

Claimant was absent on January 23, 2020 as well. Claimant did not report his absences to Harper-Zeinel. However, she arranged for her shift to be covered. Claimant could not work on that date due to a migraine headache.

Claimant had no other absences during her employment. She was never warned that continued absences may result in discharge. Claimant did not know prior to her final absence that her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the February 21, 2020 (reference 04) unemployment insurance decision that found claimant eligible for benefits is AFFIRMED. Claimant is eligible for benefits, provided she meets all other eligibility requirements.

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

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 provides in relevant part:

> 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(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 bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd*., 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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).

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 is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a

forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, *supra*; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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. Iowa Admin. Code r. 871- 24.32(7); *Cosper, supra*; *Gaborit v. Emp't Appeal Bd*., 734 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. *Gaborit, supra*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc*., 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there have 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. *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.

Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2).

Employer's written attendance policy directs employees to contact a manager/supervisor as far in advance as possible when absent from scheduled working hours. However, Harper-Zeiner had directed employees to call at least four hours in advance and considered a failure to do so a "no-

call, no-show" absence. The administrative law judge finds claimant's absences were not no-call, no-show absences. A no-call, no-show absence is where an employee is absent and fails to report it prior to her shift start time. That is not what occurred here.

The administrative law judge further finds claimant's absences were excused. Ironically, claimant's eagerness to prove her reliability and work through her illness was detrimental to her in this case. While claimant would have been well-advised to have immediately reported her influenza diagnosis to Harper-Zeiner and sought to be excused from work for the next several days, her failure to do so and attempt to work through her illness does not render her absences unexcused. She did call in to report her absences as soon as it became clear to her that she would be unable to work, which was substantially in compliance with employer's policy. As such, the absences were properly reported. They were also clearly for reasonable grounds, as she had influenza. Because claimant's absences were excused under applicable law, they do not constitute disqualifying job-related misconduct.

The claimant's absence on January 23 can hardly even be considered an absence for purposes of this misconduct analysis. She was ill and found coverage for her shift. While claimant did not strictly follow employer's call-in policy, it is difficult to see what harm this caused employer. Even if this January 23 absence was unexcused based on claimant's failure to properly report it, a single unexcused absence does not constitute substantial job-related misconduct.

II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Because the administrative law judge finds claimant is eligible for benefits, these issues need not be addressed.

DECISION:

The February 21, 2020 (reference 04) unemployment insurance decision is AFFIRMED. Claimant is eligible for benefits, so long as she meets all other eligibility requirements.

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Andrew B. Duffelmeyer
Administrative Law Judge
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Decision Dated and Mailed

abd/scn