IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BARB J JONES Claimant **EXPRESS SERVICES INC** Employer	**APPEAL 15A-UI-12362-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 29, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 24, 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 laborer from June 22, 2015, and was separated from employment on September 2, 2015, when she was discharged.

Claimant is not aware if the employer has an attendance policy. The employer does have a call-in procedure that employees are to call the employer before their shift starts if they are going to miss work.

The final incidents occurred when claimant called the employer on August 31, 2015 and September 1, 2015 to inform it that she would be off work because of her neck injury. On August 19, 2015, claimant injured her neck; claimant was not sure if it was at work or not. Claimant was not scheduled to work again until August 24, 2015. On August 24, 2015, claimant went to a chiropractor. Claimant received a note from the chiropractor saying she was to be off work for a pinched nerve the rest of the week. Claimant gave the note to the employer. On August 31, 2015, claimant was scheduled to work, but she did not work. Claimant did call the employer and told the employer she was not going to be at work because of her neck injury. On September 1, 2015, claimant was scheduled to work, but she again called the employer and said she was still having problems with her neck and was not going to be at work. Claimant went to the chiropractor on September 1, 2015. On September 2, 2015, the employer called claimant and told her she was discharged for absenteeism.

Claimant had no prior warnings for absenteeism. Claimant was not aware her job was in jeopardy.

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 § 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.

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, two unexcused absence is not disqualifying since it does not meet the excessiveness standard. Because her absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

Claimant missed her four scheduled work days the week of August 24, 2015; however, she provided a note from her chiropractor excusing her from work for those four days. On August 31, 2015 and September 1, 2015, claimant was still suffering from her neck injury and followed the employer's procedure for calling off from work. Although she did not have a doctor's excuse, claimant did properly report her unavailability for both days due to her neck injury. Claimant had no prior warnings for absenteeism and was unaware her job was in jeopardy. 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.

Furthermore, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the four absences the week of August 24, 2015 were properly reported and accompanied by a chiropractor's note, and her last absences on August 31, 2015 and September 1, 2015 were related to properly reported illness or other reasonable grounds (injury), no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The October 29, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/pjs