IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARLON Y DAVIS Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 15A-UI-11480-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/20/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) filed an appeal from the October 6, 2015 (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient evidence to show it discharged Marlon Davis (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on October 29, 2015. The claimant participated on his own behalf. The employer participated through Store Manager Kim Frost and Assistant Store Manager Karen Horsfall. Employer's Exhibit One was received.

ISSUE:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed beginning on October 10, 2014 and was separated from employment on September 20, 2015. The claimant was initially hired as a part-time employee but became a full-time employee in July 2015; which meant he was required to work 35 hours a week to maintain his benefits. The claimant lived two to three miles from the store.

On September 20, 2015, the claimant was scheduled to work at 3:00 a.m. to make the donuts and breakfast pizzas. His ride to work did not arrive and the claimant did not contact Store Manager Kim Frost as she had previously indicated she only wanted to be contacted in emergency situations. The manager on duty that weekend was Assistant Store Manager Karen Horsfall. The claimant did not have Horsfall's phone number even though it was posted in the employer's business.

Horsfall began work at 4:00 a.m., when she drove to different competitors to check on gas prices. She passed the employer's location and noticed the kitchen was still dark. She contacted the claimant when she got to work. He stated he was not at work as his ride did not show up. She offered to pick him up but he declined her offer. Horsfall directed him to contact Frost regarding his absence but he did not. Later that morning, Frost contacted the claimant and told him that he needed to turn in his keys. The claimant hung up on Frost.

The claimant was discharged for violation of the employer's no-call/no-show policy. The policy states that an employee will be considered to have voluntarily resigned his or her position after two instances of no-call/no-show. Frost defined a no-call/no-show absence as not contacting the employer within one hour after the start of the shift.

The claimant had previously had three unexcused absences, on July 6, July 20, and September 15, 2015. The absences on July 20 and September 15 were related to medical issues with the claimant's unborn child and his or her heartbeat. He was required to accompany his partner to the hospital. It is unknown why the claimant missed work on July 6. Frost had verbal discussions with the claimant about meeting his 35 hours a week and told him if his conduct continued he would have to return to a part-time position. He did not receive any written warnings related to attendance.

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 the 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:

> 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. 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. The employer was unable to show that the July 6 absence was unexcused and the other two absences were related to reasonable grounds. Because his other absences are considered excused, the employer has failed to meet its burden of proof to establish that the claimant had excessive and unexcused absences. Accordingly, benefits are allowed.

In the alternative, even if the claimant did have excessive and unexcused absences, benefits would still be allowed. The employer had not previously warned the claimant about the issue leading to the separation. It is unable to meet the burden of proof to establish that the 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.

DECISION:

The October 6, 2015 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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