IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

LATOYA D RUSSELL
Claimant

EAGLE WINDOW & DOOR INC
Employer

APPEAL NO: 07A-UI-09320-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/25/07 R: 04
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 1, 2007, reference 03, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on October 18, 2007. Claimant participated. Employer participated through Amy Turner. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time pre-finisher from October 17, 2005 until August 30, 2007 when she was discharged. Claimant called in sick on August 27 and on August 28 employer informed her it had moved her shift start time from 5:45 a.m. to 5:00 a.m. effective August 29. She spoke to three management employees advising them that her day care center does not open until 5:30 a.m., it needs a week's notice to rearrange the schedule, and that she is a single parent with no other family or other local support system in place to help in this situation. She offered to work the overtime at the end of her shift but employer refused. Others in the department still reported at 5:45 a.m. She was counted as tardy 45 minutes on August 29 and 30 when she reported at or a few minutes before her regular start time of 5:45 a.m. On August 29 she also left early due to continued illness from the day before and was not advised that would result in another point. Employer has a no-fault attendance policy that assigns the same number of points for an absence or tardiness related to illness as, for example, car trouble. Claimant did not receive a suspension prior to the discharge as part of the established disciplinary progression.

Her prior absences or tardiness on July 11, September 22 and December 7, 2006 were related to car trouble however her supervisor said she would, but did not, remove the point for tardiness on December 7 if she would still report to work that day since they were busy. Any tardiness

beyond 15 minutes counts as a full absence for the day. On February 12 she left early when the day care reported her child (age 3) was ill with fever and vomiting. On September 29, 2006, she was working in the shipping department, which was released 30 minutes early due to lack of work, and her supervisor allowed her to leave early with them.

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.

871 IAC 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.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. An employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). 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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Absences related to lack of childcare are generally held to be unexcused. *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Technology, Inc.*, 465 N.W.2d 721 (Minn. App. 1991).

The question of whether the refusal to perform a specific task, including working overtime, constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. The refusal to work overtime on only five minutes' notice does not constitute misconduct.

Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985). See also *Boyd v. IDJS*, 377 N.W.2d 1 (Iowa App. 1985) and *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. Each of claimant's absences related to her illness or the illness of her small child are considered fully excused, regardless of employer's point system. Leaving early for any reason if allowed by the supervisor is considered an excused absence. Even according to employer's point system, those two other points for absences authorized by her supervisor should not have been accumulated. The remaining two absences related to car problems are considered unexcused. As for the final instances of tardiness on August 29 and 30, employer's one or two-day notice to rearrange child care for that early in the morning was unreasonable, especially in light of her willingness to work overtime at the end of her shift. Thus the two final instances of absenteeism are excused as the reason for the inability to work overtime before the shift was reasonable. Employer has not established a final act of misconduct and benefits are allowed.

DECISION:

The October 1, 2007, reference 03, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs