IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

OLIVIA GUNN Claimant **GREATER REGIONAL MEDICAL CENTER** Employer	**APPEAL 17A-UI-04493-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/02/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 21, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 18, 2017. The hearing was continued to allow the employer to receive the claimant's exhibits, which were submitted to the Appeals Bureau in advance of the hearing. A second hearing was scheduled and conducted telephonically on May 24, 2017. The claimant participated personally. The employer participated through Kami Petitgoue. Amy Rieck and Carol Eckels also participated for the employer.

Employer Exhibits A through F, and Claimant Exhibits 1 through 53 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed part-time as an LPN (licensed practical nurse) and was separated from employment on April 5, 2017, when she was discharged for excessive unexcused absenteeism (Employer Exhibit C).

The employer's handbook provided in part that: The employer's attendance policy requires an employee notify the employer at least two hours prior to a shift of an intended absence. Excessive absenteeism or tardiness may result in termination. A doctor's statement does not excuse an employee's absence or tardiness but may be taken into consideration. In addition, twelve unexcused absences in a twelve month period can result in termination. (See administrative record/fact-finding documents) The claimant was made aware of the employer's

policies upon hire. In addition, Ms. Rieck acknowledged there was not a written policy but that the employer defined an unexcused absence as notifying the employer less than 24 hours of an absence. The employer's policy does state that any "unscheduled non-work related illness or injury" constitutes an unexcused absence.

The employer's policy stated 12 unexcused absences in 12 months could result in discharge, but used a longer period of time to identify the claimant's absences that contributed to her discharge.

The employer stated the claimant had unexcused absences as follows:

April 4, 2017	Left early due to illness
March 8, 2017	Illness, properly reported
February 3, 2017	Tardy due to sick child
January 16, 2017	Call out due to weather and no childcare
January 13, 2017	Illness, properly reported
December 27, 2016	Left early due to sick child
December 5, 2016	Absence due to sick child
December 2, 2016	Tardy due to personal emergency
July 25-27, 2016	Illness, properly reported
July 7-14, 2016	Scheduled surgery, properly reported 3 weeks in advance
May 10, 2016	Illness, properly reported
March 2-14, 2016	Scheduled surgery, properly reported in advance
February 10, 2016	Illness, properly reported
January 12, 2016	Absent due to family emergency

The employer had a progressive discipline policy which provided for a documented verbal warning, final written warning, suspension and discharge. In this case, the claimant received only a documented written warning on August 1, 2016, (Employer Exhibit B) before discharge (Employer Exhibit C).

The final incident occurred on April 4, 2017. The claimant began work and felt ill. She consulted with Merry Siehs, administrative assistant, before she left ill, and was told that she could leave once her coverage arrived. The claimant subsequently visited a doctor for the illness which persisted (Claimant Exhibit 1). The employer reported the claimant had no options to preserve her employment if she was sick on April 4, 2017 and did not have FMLA coverage. The claimant also worked around pulmonary patients and the employer acknowledged not wanting an employee with infectious disease around the patients.

A review of the absences reported by the employer reflect less than twelve in a twelve month period, and the employer could not explain why absences for scheduled surgery in which the claimant notified the employer three weeks in advance were unexcused except to state they were not covered under FMLA. Upon return to work, she was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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(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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the

evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The administrative law judge is persuaded the claimant was aware of the employer's policies which required two hours advance notice of an absence, and that upon twelve unexcused absences in a twelve month period, an employee is subject to discharge.

Without even addressing whether each of the offered employer absences would be unexcused for unemployment purposes, (including those reported weeks in advance for surgery), why the employer used more than a twelve month period to identify the twelve absences, or why progressive discipline was not applied, the undisputed evidence is the final absence on April 4, 2017, was due to illness. It was not feasible for the claimant to report it two hours in advance since she began her shift and waited until coverage arrived before leaving after becoming ill. The claimant did consult with Ms. Siehs to ask before she left. An absenteeism policy is not dispositive of the issue of qualification for benefits, as a reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Even though the claimant may have not met the employer's policy definition of notification, the administrative law judge is persuaded the claimant properly reported her absence, which was for illness. As a result, the final absence on April 4, 2017, would be considered excused for unemployment insurance eligibility.

Based on the evidence presented, the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, 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.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The April 21, 2017, (reference 01) unemployment insurance decision is **REVERSED.** The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs