IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANGELINA M INGLE Claimant **PER MAR SECURITY & RESEARCH CORP** Employer	**APPEAL 17A-UI-05784-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/22/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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:

The employer filed an appeal from the May 25, 2017, (reference 04) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 19, 2017. Claimant participated. Employer participated through security coordinator Ryan Niekamp and operations manager Rose Willer. Claimant Exhibit A was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a security officer from July 16, 2013, and was separated from employment on May 8, 2017, when she was discharged.

The employer has an absenteeism policy that requires employees to be on-time for their scheduled shift. The employer also has a call-in procedure that requires employees to call the employer four hours before the start of their shift if they are going to be absent. Claimant was aware of the policy.

On May 4, 2017, claimant was absent from her scheduled shift. At approximately 6:30 a.m., claimant called the dispatcher and reported that she was hoping that she would just be late, but her daughter was ill and she may have to be absent for the entire day if she cannot get

someone to watch her eight-year-old daughter. Claimant's daughter normally goes to school, but on May 4, 2017, she woke up at 6:15 a.m. and claimant discovered her daughter was ill. Sometimes claimant's mother is able to watch her daughter, but her mother was unable to watch her daughter on May 4, 2017. Claimant did not report to work because she had to watch her daughter. Ms. Willer and Mr. Niekamp testified that claimant told the dispatcher she would late on May 4, 2017 and claimant did not give a time she would arrive at work. The employer did not contact claimant on May 4, 2017 to determine when she would be at work. Claimant did not contact the employer again on May 4, 2017 until 3:00 p.m. At approximately 3:00 p.m. on May 4, 2017, claimant contacted Mr. Niekamp and told him that she had taken her daughter to the doctor, her daughter had strep throat, and her daughter could not return to school until May 8, 2017. Claimant Exhibit A. Claimant told Mr. Niekamp she could not return to work until May 8, 2017. Claimant Exhibit A. Mr. Niekamp asked claimant if she had worked on May 4, 2017. Claimant stated no, she had called in that morning.

Due to her daughter's illness, claimant did not work on May 5, 2017. May 8, 2017 was claimant's next scheduled work day.

At 7:02 a.m. on May 8, 2017, claimant faxed the employer a doctor's note excusing her from work on May 4, 2017 and May 5, 2017. Claimant Exhibit A. On May 8, 2017, claimant reported to work on time and she worked until approximately 9:00 a.m. The employer then contacted claimant at work and told her she was discharged. Claimant did not agree with the discharge. Claimant told the employer she had excuses for her absences and insisted that she did not tell the dispatcher that she would be late on May 4, 2017.

Claimant was last warned regarding her absenteeism on December 23, 2016. The employer outlined claimant's absences in the prior four months and warned her that she faced termination from employment if she repeated her pattern of absenteeism. Prior to December 23, 2016, claimant was absent or tardy on: August 31, 2016 (left work three hours early); September 27, 2016 (child was sick); October 10, 2016 (daughter was sick); November 14, 2016 (tardy); December 5, 2016 (tardy); December 7, 2016 (tardy due to weather); December 12, 2016 (claimant was sick); and December 19, 2016 (tardy). After December 23, 2016, claimant was also absent or tardy on: January 12, 2017 (tardy due to weather); January 31, 2017 (mother-in-law sick); February 27, 2017 (claimant was sick (doctor's note provided)); February 28, 2017 (claimant was sick (doctor's note provided)); March 23, 2017 (tardy by 15 minutes due to car battery issues); April 6, 2017 (claimant was sick); April 7, 2017 (claimant was sick); April 19, 2017 (tardy due to weather); and April 20, 2017 (tardy due to blood work for claimant's son). Claimant Exhibit A. Claimant would notify the employer about her absences or tardies before the start of her shift, but not always four hours before the start of her shift.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code section 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.* 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).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743 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. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Where an employer is aware of the nature of the claimant's illness and has fair warning that he may be absent for an extended period of time due to that illness, failure of the employee to contact the employer is not misconduct as the absences are excused. This is so where the claimant had no telephone and was bedridden with scarlet fever. *Floyd v. Iowa Dep't of Job Serv.*, 338 N.W.2d 536 (Iowa Ct. App. 1983).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The employer's argument that claimant only told the dispatcher on May 4, 2017 that she would be late to work, is not persuasive. The employer did not present the dispatcher to testify about the conversation with claimant; whereas, claimant presented direct, first-hand testimony that she told the dispatcher she would be absent on May 4, 2017 if she could not find someone to watch her daughter because of her daughter's illness.

Claimant credibly testified that normally her daughter would go to school on May 4 and 5, 2017; however, due to her daughter's illness, her daughter could not go to school on those days and she had to stay home with her daughter. Claimant could not work on May 4, 2017 or May 5, 2017 due to her daughter's illness. Although generally childcare is a personal responsibility, 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).

On May 4 and 5, 2017, claimant was not absent from work because she did not make arrangements for childcare, she was absent from work because her daughter could not go to school like her daughter normally would because her daughter was ill. Claimant did provide the employer a doctor's note regarding her absences on May 4 and 5, 2017. Claimant Exhibit A. Because claimant's last absences on May 4 and 5, 2017 were related to a reported illness or other reasonable grounds (her daughter's illness), 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.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The May 25, 2017, (reference 04) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs