IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CASSANDRA A FUNTE Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 20A-UI-00173-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/01/19** **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/appellant filed an appeal from the December 27, 2019 (reference 01) unemployment insurance decision that found the claimant was eligible for unemployment insurance benefits due to her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on January 27, 2020. The claimant, Cassandra A. Funte, participated personally. Witnesses Toni Funte and Toleka Juenger participated as witnesses for the claimant. The employer, Casey's Marketing Company, participated through witness LeAnn Spencer. Employer's Exhibits 1 through 4 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 part-time as a kitchen worker in the employer's convenience store. She typically worked at 3:00 a.m., which was two hours prior to the store opening. She was employed from September 26, 2019 until November 27, 2019. Claimant's supervisors were LeAnn Spencer and Brooke Mueller.

The employer has a written attendance policy which was made available for the claimant to review. See Exhibit 2. The policy provides that violation of the attendance policy may lead to termination. Exhibit 2. The policy does not state what amount of absences would subject an employee to termination under the policy. See Exhibit 2. The employer has a written policy stating that use of profane language towards customers is prohibited. See Exhibit 2.

Claimant was tardy to work on October 12, October 20, October 23, November 6, November 7, November 8, November 11, November 12, November 13, November 19, November 20, November 21 and November 26, 2019. Claimant notified her supervisor by text message that she would be tardy to work; however, she did not make a telephone call to her supervisor as the policy required. Her tardiness was due to transportation issues or oversleeping.

Ms. Mueller told the claimant that she was not concerned about her tardiness because she was able to complete her job tasks each day prior to the store opening. Claimant's shift started two hours prior to the store opening. Claimant did not receive any verbal or written discipline regarding her tardiness because she was on her 90-day probationary period of employment.

Claimant's mother also worked at the store. On November 27, 2019, claimant sent Ms. Mueller text messages about the reason for her mother's tardiness to work that day. See Exhibit 4. Claimant told Ms. Mueller that she was unable to get her vehicle out of her driveway on her gravel roads to get her mom to work because it had not been plowed. See Exhibit 4. Claimant used profane language in two separate text messages with Ms. Mueller on November 27, 2019. See Exhibit 4. Claimant was discharged on November 27, 2019 for using profane language with Ms. Mueller via text message and for her previous tardiness.

Claimant received benefits of $0.00 since filing her initial claim for unemployment insurance benefits. The employer did not participate by telephone in the fact finding interview; however, it provided information in its statement of protest alleging that the claimant was discharged for being late 13 times and texting that she was late, which was an inappropriate form of communication. The statement of protest does not list the specific dates of alleged tardiness.

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, provided the claimant is otherwise eligible.

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.
>
> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id*. at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. 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. *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. *Id.* at 558. 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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

Typically, this amount of tardiness would be considered excessive unexcused absenteeism; however, in this case, the employer's policy does not list the amount of absences, or incidents of tardiness, that may lead to discharge and the claimant credibly testified that her supervisor, Ms. Mueller, told her that her tardiness was not concerning because the store was not open and the claimant was able to complete her job tasks before the store was opened. No previous verbal or written warnings about tardiness were given to the claimant. When a supervisor informs an employee that their tardiness is not concerning, it is clear that the employee is not put on notice that additional tardiness may lead to discharge.

Inasmuch as employer had not previously warned claimant about the tardiness 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.

The incident of the claimant using profane language with Ms. Mueller occurred while the claimant was off-duty and was regarding getting her mother to work. The employer's policy provides that use of profane language with customers is prohibited. Further, it is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

The claimant's use of profanity with her supervisor, while she was off-duty, in response to her supervisor's allegation that the snow was easy to get through, was an isolated incident that does not rise to the level of substantial job-related misconduct. While the administrative law judge does not condone this type of behavior, it is understandable how, in the spur of the moment, the claimant would have reacted this way. This single occurrence of profanity, which was not accompanied by any threats of violence or said in front of customers, was an isolated

incident of poor judgment and claimant is guilty of no more than "good faith errors in judgment." 871 IAC 24.32(1)(a). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986).

The employer failed to present any evidence that the claimant engaged in a current act of job-related misconduct. Without establishing a current act of job-related misconduct, this separation from employment is not disqualifying. Benefits are allowed, provided the claimant is otherwise eligible. Because benefits are allowed, the issues of overpayment and chargeability are moot.

DECISION:

The December 27, 2019 (reference 01) unemployment insurance decision allowing benefits is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

_____
Dawn Boucher
Administrative Law Judge

_____
Decision Dated and Mailed

db/rvs