IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SKYLAR R THOMPSON Claimant **REM IOWA COMMUNITY SERVICES INC** Employer	**APPEAL 21A-UI-02716-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/11/20** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

REM Iowa Community Services Inc., the employer/appellant, filed an appeal from the December 29, 2020, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 10, 2021. The employer participated through Jenna Wenzel, program director, Jody Kampe, program supervisor and RoxAnne rose, hearing representative. Ms. Thompson did not participate. Official notice was taken of the administrative record.

ISSUES:

Was Ms. Thompson's separation from employment a discharge for disqualifying job-related misconduct?
Was Ms. Thompson overpaid benefits?
If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Thompson began working for the employer on April 17, 2019. She worked as a full-time direct support professional. Her supervisor was Ms. Kampe and Ms. Kampe's supervisor is Ms. Wenzel. Her employment was terminated on October 15, 2020 for excessive absenteeism, tardiness and leaving work early.

The employer's policy provides that employees who will be absent or late to work must personally notify their supervisor or the on-call supervisor no later than four hours prior to their scheduled start time. Voicemails, emails or text messages are not accepted as notification. Employees who need to leave work early must personally notify their supervisor or the on-call supervisor. Any unscheduled absence, incident of tardiness, or leaving working early, no matter the reason, results in an employee being docked one occurrence. Three occurrences lead to

disciplinary action in the following progression: verbal warning, written warning, final written warning, and termination of employment.

Ms. Thompson was issued a written warning on July 27, 2020 for three occurrences: 1) calling in less than four hours before her 8:00 a.m. shift on April 24 due to lack of childcare, 2) calling in less than four hours before her 8:00 a.m. shift on July 18 due to lack of childcare, 3) informing the employer less than four hours before her 8:00 a.m. shift on July 22 that she would be late due to lack of childcare, and later telling the employer that she could not attend work that day due to lack of childcare.

Ms. Thompson was also written up that day for several other absences and incidents of tardiness prior to April 24. However, Ms. Thompson had already been issued a final written warning on April 3, 2020 for those same absences and incidents of tardiness. Ms. Wenzel had begun working as the program director and Ms. Thompson's two-up manager in May 2020. Ms. Thompson had been on maternity leave from May 20 through July 13. Ms. Wenzel decided to go back to step two of the progressive discipline process and give Ms. Thompson a written warning on July 27, instead of terminating her employment, because Ms. Thompson had just returned from maternity leave and because the previous program director had issued the April 3 final warning.

Ms. Thompson was issued a final warning on September 25, 2020 for six occurrences: 1) calling in due to lack of childcare on August 9, 2) calling in due to lack of childcare on August 10, 3) sending a text message to her supervisor on August 16 telling her supervisor that she would be late to work and at an unspecified later time, texting her supervisor to let the supervisor know that she would not attend work at all that day, 4) being late to work on August 24 due to lack of childcare, 5) calling in sick less than four hours before her shift on August 30 due to being in the emergency room because she was ill, and 6) calling in on September 11 due to lack of childcare.

Ms. Thompson's employment was terminated on October 15 for three occurrences: 1) calling in at 4:15 a.m. before her 8:00 a.m. shift on September 27 when her boyfriend's mother had had a heart attack, 2) leaving work early on October 1 because her boyfriend's mother had died, 3) calling in more than four hours before her 8:00 a.m. shift on October 4 because her child was sick and she did not have childcare, and 4) calling in at 7:43 a.m. before her 8:00 a.m. shift on October 9 due to having strep throat. The employer asked Ms. Thompson if she had a doctor's note. Ms. Thompson said she would bring in a doctor's note but she did not do so.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Thompson was discharged from employment for no disqualifying reason.

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *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).

Excessive absences are not considered misconduct unless unexcused. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *Gaborit v. Emp't Appeal Bd.*, 734 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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id*.; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

The employer decided to restart the clock once Ms. Wenzel began working for the employer in May 2020. Therefore, the April 4, 2020 final warning and all other prior warnings issued to Ms. Thompson are of no effect for this analysis. Most of Ms. Thompson's absences were not for reasonable grounds and, thus, were unexcused. While the administrative law judge is very sympathetic to Ms. Thompson's lack of childcare for her new born child, the law requires that all of her absences and incidents of tardiness due to lack of childcare as unexcused absences.

However, several of Ms. Thompson's absences are deemed excused. Ms. Thompson's August 30 absence was for a reasonable ground and was properly reported. Despite the employer's policy, life does not always happen in four hour increments. Ms. Thompson was sick on August 30, she went to emergency room and she told the employer before her shift. This is an excused absence and does not constitute misconduct.

Ms. Thompson's September 27, October 1 and October 9 absences are also deemed excused as they were for reasonable grounds and were properly reported. At 4:15 a.m. on September 27, Ms. Thompson informed the employer that she would not attend work that due to her boyfriend's mother having a heart attack. On October 1, Ms. Thompson left work early due to her boyfriend's mother dying. On October 9, Ms. Thompson called in at 7:43 a.m. before her 8:00 a.m. shift due to having strep throat. The law does not require Ms. Thompson to provide a doctor's note for an absence due to illness to be excused and neither does the employer's policy. Ms. Thompson not providing a doctor's note is not misconduct and Ms. Thompson's excused absences are not misconduct. Since the employer has failed to establish misconduct on Ms. Thompson's part on September 27, October 1 and October 9, the termination was not for misconduct and benefits are allowed.

Because Ms. Thompson is eligible for benefits, the issue of repayment is moot.

DECISION:

The December 29, 2020, (reference 01) unemployment insurance decision is affirmed. Ms. Thompson was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

_____

Daniel Zeno
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

March 15, 2021
Decision Dated and Mailed

dz/scn