IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ELLEN L FRANK Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 17A-UI-07877-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/02/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 July 25, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 21, 2017. The claimant participated and testified. The employer participated through Area Supervisor Karen Colvin, Assistant Manager Andrea Bell, and Unemployment Insurance Consultant Amber Niles. Employer's Exhibits 1 through 6 and claimant's Exhibits A through C were received into evidence.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?
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 full time as a store manager from March 30, 2016, until this employment ended on June 30, 2017, when she was discharged.

Claimant was scheduled to work June 26 through June 30, 2017. Claimant did not report to work any of these days. Claimant testified she was hospitalized on June 26, 2017 and was not released to return to work until July 1, 2017. According to claimant, the morning of June 26, she was not feeling well so she phoned the store and spoke to Bell. Claimant testified she told her she would not be in and would call later, probably during the p.m. shift, with more information. Claimant was then hospitalized. The following day, while claimant was in the hospital, her

mother contacted the store to let the second assistant manager know claimant would not be in. According to claimant her mother also left a written medical excuse with the employer to be given to Colvin. (Exhibit A). Claimant testified, on June 28, she phoned Colvin and left her a voice message stating she would be out for medical reasons until July 1, 2017. According to claimant she received a voice message from Colvin later that day, which was the first contact Colvin had had with her. Claimant then sent Colvin an email stating she would be on medical leave until July 1, 2017. (Exhibit C). Claimant did not hear from the employer again until June 30, 2017, when she received a message from Colvin instructing her not to come in the following day as scheduled and to turn her keys in because she had been separated from employment.

Colvin denied she ever received claimant's voice message or her email. According to Colvin, claimant was a no-call/no-show June 26 through June 30. Bell testified she did speak to claimant on June 26, but thought she said she would be in to work the p.m. shift. Colvin testified, when claimant did not show up to work on June 26, she attempted to call her, but got voicemail. Colvin instructed claimant to call her back and speak with her personally. Colvin testified she did not hear back from claimant. Colvin confirmed claimant's mother did come in and speak with the second assistant manager and it was her understanding she told him claimant would return to work the following day, June 28. Colvin spoke with several employees, none of whom were aware of claimant's mother brining in a medical excuse. Colvin denied she received any calls or emails from claimant, but testified she had heard claimant was planning on returning to work on July 1.

The employer's policies provide for separation from employment after two consecutive no-call/no-shows. (Exhibit 4). On June 30, 2017, Colvin left a message for claimant instructing her not to come in, as she had been separated from employment. Colvin noted claimant had been written up twice before for being a no-call/no-show. The first occurred on March 10, 2017 and the second on March 28. (Exhibit 6). Claimant was advised that she may be separated from employment if this occurred again. Claimant acknowledged she had been written up before, but noted on both occasions she did notify an assistant manager of her absence. Claimant testified she did not report these absences to an area manager because Colvin was on leave and she was not sure who to report to.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 25, 2017. The claimant filed for and received a total of $2,838.00 in unemployment insurance benefits for the weeks between July 2 and August 12, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on July 21, 2017. The fact finder determined claimant qualified for benefits.

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 Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5,

> subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The employer's policies provide for separation after two consecutive absences, rather than three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment. The employer also acknowledged it was aware claimant was intending on returning to work on July 1, 2017, indicating it was not her intent to quit. For these reasons the separation was a discharge and not a quit.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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).

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). Excessive absences are not considered misconduct unless unexcused. 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.*, 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. *Gaborit*, supra.

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. See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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*.

Claimant testified both she and her mother attempted to contact the employer to let them know she would not be in to work the week of June 26. Claimant testified she relayed this information directly to employees at the store via telephone and that she attempted to contact Colvin via telephone and email. Colvin denied receiving any of claimant's messages. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be credible. While it may be true that Colvin, for whatever reason, did not receive the voicemail and email messages from claimant, claimant has provided a copy of the email sent showing she attempted to contact Colvin and told her she would be on medical leave until July 1. This lends credibility to claimant's version of events overall.

Claimant phoned the store on June 26, 2017, to let them know she was ill and would not be in, but would keep them updated. Claimant then became too sick to communicate with the employer, so her mother provided this communication on her behalf, notifying both the store and attempting to notify Colvin of the situation. When claimant was feeling better, on June 28, she notified Colvin she would be off work until July 1 via telephone call and email. While, it may be true that Colvin never received claimant's messages, claimant nevertheless put forth her best efforts to communicate with the employer and properly report her absences for the week. Claimant's absences were due to illness and are therefore excused. Because her 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, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The July 25, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs