IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMBER D KILGORE Claimant **HORMEL FOODS CORPORATION** Employer	**APPEAL 15A-UI-13238-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/01/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 25, 2015 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 17, 2015. Claimant participated. Employer participated through representative Jackie Nolan and plant controller Erin Montgomery. Claimant's Exhibit A was admitted into evidence with no objection.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a service tote night shift from October 14, 2015 and was separated from employment on November 5, 2015; when she was discharged.

The employer has a collective bargaining agreement. There is a progressive disciplinary policy, which calls for verbal warning, then written warning, then first strike, then a second strike with suspension, and then the third strike is discharge. The attendance policy states if you have three absences in a five-month period, then discipline is issued depending on what level of discipline the employee is at. If an employee is going to miss work the employee needs to notify the employer thirty minutes prior to the start of their shift. If an employee is going to leave early, they need to notify their supervisor. It is a no fault attendance policy. A doctor's note will not excuse absences but it may combine the absences.

On October 29, 2015, claimant walked off of her job because she was in a lot of pain. Claimant did not tell the employer she was leaving. Claimant went to the emergency room to seek medical treatment (Claimant's Exhibit A). Claimant did not tell anyone she was leaving because when she came into work on October 28, 2015 she was in a lot of pain and she asked her supervisor if they could find someone to work for her. The supervisor did not find anyone and if she had left it would have been an unexcused absence. Claimant thought the same thing would

happen on October 29, 2015. The employer did not try to contact her after they discovered she left on October 29, 2015. On October 30, 2015, claimant met with the plant manager and Ms. Montgomery. Claimant already had two strikes for attendance and a pending suspension. On October 30, 2015, claimant provided a doctor's note to the employer that she sought treatment after leaving on October 29, 2015 (Claimant's Exhibit A).

Claimant had prior warnings/strikes for attendance issues on July 20, 2015 (second strike), June 30, 2015 (first strike), June 1, 2015 (written warning), and March 2015 (verbal warning). Claimant knew her job was in jeopardy after receiving her second strike. Claimant had provided doctor's notes for some of her absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

The first issue is whether claimant quit her employment or was discharged. Claimant walked off the job on October 29, 2015 and went to the emergency room to seek medical treatment. On October 30, 2015, claimant met with the employer regarding the incident. The employer told claimant she was going to serve her suspension that was still pending and then they would make a decision. On November 5, 2015, claimant was told she was separated from employment. Claimant never told the employer she quit. For these reasons, claimant did not quit, but the employer discharged her. The next issue was whether claimant was discharged for job disqualifying 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:
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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, (4), and (7) provides:

> Discharge for misconduct.
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> (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).
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> (4) Report required. The claimant's statement and the 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.
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> (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 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). 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.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including

discharge for the incident under its policy. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. 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.

On October 29, 2015, claimant left work without notifying the employer. Under the employer's policies, this would normally result in, at minimum, an unexcused absence counting against claimant. However, under the unique circumstances, claimant's leaving was reasonable. The first unique circumstance was that claimant was not feeling well during her prior shift (on October 28, 2015) and had requested to leave but the employer informed her that if she left early it would be considered unexcused and may result in discharge because she had already received her third step. Claimant then stayed and worked her shift. The second unique circumstance was that, on October 29, 2015, claimant did not just leave work and go home, instead she was in such pain that she went to the emergency room to seek treatment (Claimant's Exhibit A). Claimant then provided documentation to the employer regarding her treatment the next day (October 30, 2015). Even though claimant did not follow the employer's reporting procedure (notifying her supervisor before leaving) on October 29, 2015 because of the above stated unique circumstances, claimant's failure to report her illness until October 30, 2015 is reasonable.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence was related to illness or other reasonable grounds and was reported the next day with documentation, 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.

DECISION:

The November 25, 2015 (reference 01) unemployment insurance decision is reversed. Claimant 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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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