IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARY A ATHIM Claimant **SMITHFIELD FRESH MEATS CORP** Employer	**APPEAL 19A-UI-04173-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/14/19** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On May 20, 2019, the claimant filed an appeal from the May 1, 2019, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephonic hearing was commenced on June 17, 2019, and was continued to June 20, 2019 and continued again on July 16, 2019. The claimant, Mary A. Athim, participated along with witness Leo Kanne and was represented by Dennis M. McElwain, Attorney at Law. Dinka/English interpreters Aguek (ID number DKAR) and Diar (ID number 0363) of CTS Language Link provided interpretation services for the hearing. The employer, Smithfield Fresh Meats Corporation, participated through Becky Jacobsen, Human Resources Manager. Claimant's Exhibits 1 through 8 and Employer's Exhibits A through L were received and admitted into the record without objection.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time, most recently as a production worker, from September 13, 2016, until April 12, 2019, when she was discharged for absenteeism. The employer uses a points-based attendance discipline system that operates on a rolling calendar year. Claimant accrued twelve points, which resulted in her discharge. Claimant's standard work schedule was to work ten-hour days, beginning at 6:30 a.m., five days per week.

Claimant's final absence occurred on March 28, 2019. Claimant was scheduled to work at 6:30 a.m. Initially, claimant called in sick that morning. Then, at 8:13 a.m., claimant reported to work. Claimant explained that she had been trying to get ahold of her case manager regarding her minor son who has autism, reactive-attachment disorder, and other medical issues. Later in the day, claimant left for approximately one hour to try and contact her DHS worker. Claimant reported this to the employer, and she had permission to step away from work and make this

call. Claimant had also attempted to reach the DHS worker when she was on her lunch break, but the DHS worker was not available.

Claimant went on vacation during the week of April 1, 2019. When claimant returned to work on Monday, April 8, the employer offered her FMLA paperwork. Claimant came to the office on April 11 and said her doctor would not fill out the FMLA paperwork because her blood pressure was high but not dangerously high. The following day, the employer discharged her.

Claimant had a recent history of absenteeism. Claimant arrived at work at 8:36 a.m. on March 26, 2019. That same day, she left work at 1:51 p.m., before her scheduled departure time. Claimant was at the doctor that afternoon. (Exhibit 8) According to the employer's records, claimant arrived at work late on March 4, 2019. Claimant denies she was late that day, and she believes this was an instance where she was on time but did not swipe her badge. On February 6, 2019, claimant arrived to work at 8:29 a.m. Claimant attributed this late arrival to either her personal illness or her son's illness. Claimant left work at 3:50 p.m. on January 23, 2019, to attend a doctor's appointment. Claimant had permission from her supervisor to leave for the doctor that day. Claimant left work early on January 17, 2019, because her son was sick. Claimant provided a letter from the school stating her child was sick and she had to pick him up, but the employer would not excuse the absence under its "no-fault" attendance policy. Claimant left work for the day at 9:26 a.m. on December 20, 2018, because her son was sick. Claimant left work for approximately 45 minutes in the middle of the day on October 12, 2018. Claimant believes she had a medical appointment that day.

The unemployment insurance decision was mailed to the appellant's address of record on May 1, 2019. Claimant explained that she had moved around the time that the decision was issued. She diligently checked with the post office each day to inquire about mail. The appellant did not receive the decision until on or about May 19, 2019. When claimant received the decision, she immediately took it to her union hall, and the union hall forwarded it on to claimant's attorney. Claimant filed her appeal on May 20, 2019, one day after receiving the decision.

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, provided she is otherwise eligible.

As an initial matter, the administrative law judge must determine whether claimant timely filed her appeal. Iowa Code § 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of

> proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

In this case, claimant did not have an opportunity to timely appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Claimant appealed the decision within one day of receiving it. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged from employment for 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(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*, 321 N.W.2d at 6; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). 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 no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant's final absence was a two-part absence related to her minor son and his medical conditions. The evidence in the record shows that claimant made an effort to deal with these issues on her lunch break but was not able to do so because of the DHS worker's unavailability. The administrative law judge finds the final absence was properly reported to the employer and was excused. Because claimant's 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, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The May 1, 2019, (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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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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