IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

MARSHA SCHEUERMANN Claimant **LUTHER CARE SERVICES HOMES / FOR** Employer	**APPEAL 21R-UI-14391-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/03/21** **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, Marsha Scheuermann, filed an appeal from the February 15, 2021, reference 01, unemployment insurance decision that denied benefits based upon the conclusion she was discharged due to excessive absenteeism. A telephone hearing was scheduled for April 23, 2021 at 2:00 p.m. The claimant did not a register a phone number for that hearing and did not participate. The administrative law judge issued a default decision, 21A-UI-05488-SN-T.

On June 24, 2021, the claimant appealed to the Employment Appeal Board (EAB). The EAB remanded the case back down to the administrative law judge because the claimant did not receive a notice of hearing.

The parties were properly notified of the hearing. A telephone hearing was held on August 23, 2021. The claimant participated. The claimant was represented by Mark Critelli, attorney at law. The employer participated through Environmental Services Supervisor Tammy Long and Chief Human Resources Officer Deb Nowachek. No exhibits were received.

ISSUE:

Whether the claimant's separation from employment is disqualifying?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full time as a housekeeper from December 2, 2015, until this employment ended on January 4, 2021, when she was discharged. The claimant's immediate supervisor was Environmental Services Supervisor Tammy Long.

The employer has an attendance policy which is outlined in its employee handbook. An employee is to notify their supervisor prior to the start of their shift that they will not be at work that day. The employer's attendance policy does not differentiate between absences due to illness and other justifications. It follows a progressive discipline with the following stages:

verbal, written, second written / suspension and termination. The claimant acknowledged receipt of the employee policy in September 2019.

On October 5, 2018, the claimant called in prior to the start of her shift and said she was ill.

On October 30, 2018, the claimant called in prior to the start of her shift and said she was ill.

On November 25, 2018, the claimant called in prior to the start of her shift and said she was ill.

On December 14, 2018, the claimant called in prior to the start of her shift and said she was ill.

On December 23, 2018, the claimant left her shift early because she was ill.

On January 11, 2019, the claimant received a verbal warning from former environmental services supervisor, Dan (last name unknown).

On May 21, 2019, the claimant received a first written warning from Dan (last name unknown) for the incidents occurring on May 17, 2019, April 25, 2019 and April 5, 2019.

On January 10, 2020, the claimant left prior to the end of her shift because she was feeling ill. She attempted to call Ms. Long and the employer's human resources department, but she was not able to get anyone on the line. The claimant left a note for Ms. Long stating she was ill that day as a justification.

On January 14, 2020, the claimant called Ms. Long and told her she would not be at work that day due to having a migraine.

On January 15, 2020, the claimant called Ms. Long and told her she would not be at work that day due to having a migraine.

On January 16, 2020, the claimant left work early without permission. The claimant could not remember if she had a justification for that day, but she believes it could have been due to having a migraine.

On January 30, 2020, the claimant called Ms. Long and told her she would not be at work that day due to having a migraine.

On February 7, 2020, the claimant received a third and final written warning for attendance from Ms. Nowachek for attendance incidents occurring on January 10, 2020, January 14, 2020, January 15, 2020, January 16, 2020, and January 30, 2020. The written warning stated that further attendance incidents could lead to immediate discharge.

On October 29, 2020, the claimant called Ms. Long and informed her that she would not be at work that day because she was ill.

On October 30, 2020, the claimant called Ms. Long and informed her that she would not be at work that day because she was ill.

On December 30, 2020, the claimant called Ms. Long prior to the start of her shift to inform her that she was stuck in the street due to a heavy snowfall. Ms. Long offered to send a coworker to her home to pick her up. The claimant rejected that offer and stated she was digging her car

out. About an hour later, the claimant called Ms. Long and informed her that she had injured her back shoveling the snow and would not be at work on that day.

On January 4, 2021, Ms. Long and Human Resources Generalist Kristen Andersen discharged the claimant for the attendance incident occurring on December 30, 2020. Ms. Long testified she did not make this determination on the belief the claimant was lying when she said she had injured her back. In fact, the claimant provided a doctor's note verifying that she had injured her back on December 30, 2020. The employer did not take the doctor's note because it had already determined to terminate her.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for non-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:
>
> 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(7) and (8) provide:

> (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.
>
> (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.

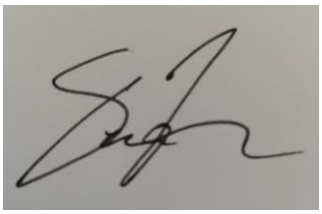
Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for 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. 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. This case is illustrative of why an employer's policy cannot be dispositive. The employer's witnesses testified that the claimant called in with proper notice on December 30, 2020, October 29, 2020 and October 30, 2020. These attendance incidents were excused due to various forms of illness and cannot be considered as incidents of absenteeism given the rule in Iowa Admin. Code r. 871-24.32(7). Given the employer cannot provide an attendance incident occurring throughout most of 2020, the employer has failed to meet its burden to show that a current act of misconduct lead to the claimant's discharge to satisfy Iowa Admin. Code r. 871-24.32(8). Benefits are granted.

DECISION:

The February 15, 2021, reference 01, unemployment insurance decision is reversed. Benefits are granted, provided the claimant is otherwise eligible.



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Sean M. Nelson
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August 27, 2021
Decision Dated and Mailed

smn/mh