**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **TRAVIS M CAVANAUGH**<br>Claimant<br><br>**GOBBIES LLC**<br>Employer | **APPEAL 17A-UI-01037-LJ-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 01/01/17**<br>**Claimant: Appellant (2)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 19, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant voluntarily quit his employment because of a non-work-related illness or injury. The parties were properly notified of the hearing. A telephone hearing was held on Monday, February 20, 2017. The claimant, Travis M. Cavanaugh, participated. The employer, Gobbies, L.L.C., participated through Larry Ikonomopolous, Owner/Operator. Claimant's Exhibit A and Employer's Exhibits 1 and 2 were received and admitted into the record.

**ISSUE:**

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?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time, most recently as a bartender, from August 2015 until December 29, 2016, when he was discharged for absenteeism. Claimant sent Ikonomopolous a message on December 29 and reported that he would not be able to come to work due to accidental gluten exposure that caused illness. Specifically, claimant told Ikonomopolous that he could not get off the toilet or walk and would not be able to drive into work, as he commuted 45 minutes each way. Ikonomopolous initially responds that claimant will need a doctor to release him to return to work. Ikonomopolous followed up with claimant the next day to ask if claimant was getting a doctor's note, and claimant expresses that he will not be able to get in to see a specialist immediately. Claimant reiterates that he was accidentally exposed to gluten the day before, which caused his health issue. Claimant also states that he is no longer experiencing the health issue. Ikonomopolous repeats his request that claimant provide a doctor's note and states that if claimant does not provide a note, the employer will consider this his resignation. Ikonomopolous continues: "Your lack of attendance over the last month has been out of control.

It has made you a unreliable worker which is also becoming a larger issue. I am taking you off the schedule for now."

Claimant testified that he had similar health issues in the past during his employment with this employer. He made Ikonomopolous aware of these issues. On one occasion, claimant left work due to this same issue. Previously, he was never required to provide a doctor's note in order to return to work. Ikonomopolous testified that he asked for a doctor's note because claimant reported being weak and fatigued as well as toilet-bound, and he was concerned that claimant had food poisoning and could potentially spread illness to coworkers and customers. Ikonomopolous does not always required employees to provide doctors' notes. He testified that claimant was going to miss important upcoming shifts if he did not provide a doctor's note and return to work, so he removed him from the schedule.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Iowa Code §96.5(1) provides:

> An individual shall be disqualified for benefits:
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> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In this case, the employer has not provided sufficient evidence to show claimant voluntarily quit his employment. While the administrative law judge acknowledges that claimant did not immediately provide the doctor's note that the employer requested. However, claimant did provide the employer with additional statements explaining why he felt he could not – and did not need to – provide this note. Claimant never stated he no longer wanted to remain employed, and there is no evidence in the record that he took other overt action evincing a desire to end his employment. Therefore, this case will be analyzed as a discharge from employment, and the employer bears the burden of establishing disqualifying misconduct.

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.

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).

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.

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 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 properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. While an employer may in some circumstances request a doctor's note to excuse an absence, the administrative law judge finds the employer had no reason to request the doctor's note in this situation, other than to provide a barrier to claimant returning to work. 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.

**DECISION:**

The January 19, 2017 (reference 01) unemployment insurance decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he 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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