IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOLYNDA K HUFF Claimant **MAHASKA COUNTY HOSPITAL** Employer	**APPEAL 15A-UI-14308-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/29/15** **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 December 22, 2015, (reference 01) unemployment insurance decision that denied benefits based upon discharge for misconduct. The parties were properly notified of the hearing. A telephone hearing was held on January 22, 2016. The claimant, Jolynda Huff, participated and testified. The employer, Mahaska County Hospital, participated through Human Resources Director Jacky Bresnahan, and Director of Inpatient Services Amanda Rynearson. Employers Exhibits 1 and 2 were received into evidence.

ISSUE:

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 as a health unit coordinator from December 3, 2012, until her employment ended on November 30, 2015, when she was terminated for violating the attendance policy.

At the time of claimant's termination, the employer had in place an attendance policy which provided for progressive discipline for employees beginning with four unscheduled absences within a six-month time period. The final step in the progressive disciplinary policy is review for dismissal after seven unscheduled absences. In the six months prior to claimant's termination she received two half-absences for missing staff meetings on June 3 and August 5, 2015, and five full-absences for missing work on June 11 and 12; July 3; October 19, 20, and 26; and November 25, 2015. Days that were missed consecutively were counted as only one absence under the employer's attendance policy. Claimant missed work on June 11 and 12 and October 19 and 20 due to her own illnesses. Claimant received disciplinary action for her attendance in accordance with the employer's progressive disciplinary policy on July 3, October 20, and October 26, 2015. Claimant received additional discipline for an incident unrelated to her attendance in March 2015.

The final absence occurred on November 25, 2015, when the claimant called the employer to report her grandchildren were sick and she was staying home with them. Prior to November 25, claimant had been warned that seven unscheduled absences would lead to review of possible termination. (Exhibit 1). Claimant's absence on November 25 brought her to six unscheduled absences. Claimant believed that her November 25 absence may lead to a suspension, but did not believe, based on the employer's attendance policy, it would lead to termination. Claimant had been scheduled for paid time off (PTO) on November 27, 2015; however her absence on November 25 exhausted her PTO. No one at the employer informed claimant that she needed to report to work on November 27 and she was not scheduled that day. No one at the employer informed claimant that if she did not come into work on November 27 she would be terminated. Claimant was notified over the phone, on November 29, 2015, by Rynearson, that her employment was going to be terminated.

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. Benefits are allowed.

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(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 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); 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.*

The employer's policy calls for a review for discharge after an employee accumulates seven unscheduled absences within a six-month time frame. While an employer's point system or absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged claimant contrary to the terms of its own policy, as she had only accumulated six unscheduled absences. The employer argues that claimant's November 27 absence would have been her seventh occurrence, which would warrant review for dismissal. However, the parties both agree that claimant had previously been approved for PTO on November 27 and therefore was not scheduled to work that day. No one at the employer notified claimant that if she did not come in on November 27, despite not being on the schedule, her employment would be terminated. The employer attempted to argue that claimant's unrelated discipline in March 2015 warranted a deviation from its progressive disciplinary policy. However, the employer provided no evidence showing the claimant was put on notice that her disciplinary action in March could lead to this deviation from the policy. Since the consequence of discharge was more severe than other employees would receive for similar conduct by the terms of the policy, the disparate application of the policy cannot support a disqualification from benefits. Furthermore, at least two of the points were assessed due to claimant's own illnesses, which are not considered unexcused. The employer has not met its burden of proof to establish misconduct.

Inasmuch as employer had not adequately warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

DECISION:

The December 22, 2015, (reference 01) unemployment insurance decision is reversed. 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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/css