IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BONNIE BARTON Claimant **SERVICE MASTER OF MARSHALLTOWN** Employer	**APPEAL 20A-UI-15059-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/26/20** **Claimant: Appellant (1)**

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 October 28, 2020, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she had been terminated for excessive absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on January 21, 2021. The claimant participated. The employer participated through Treasurer Shannon Naughton. Exhibits 1, 2, 3, 4, 5, and 6 were entered into the record. Official notice was taken of the administrative records.

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:

The claimant was employed full-time as custodian from December 23, 2019, until her employment ended on July 6, 2020, when she was terminated. Her immediate supervisor was Production Manager Lisa See.

The employer provided a copy of its attendance policy. It states an employee an employee will received a verbal warning after one tardy, a written warning after two instances of being tardy, and terminated for a third occurrence. It also states not calling up and not showing up for work on one stances warrants immediate discharge. (Exhibit 4)

The claimant's attendance became unreliable in the months preceding her termination. The employer provided a copy of payroll documents from that period which corroborate instances written below. (Exhibit 2)

On May 6, 2020, the claimant was 25 minutes late to her assignment.

On May 15, 2020, the claimant was 10 minutes late to her assignment.

On May 17, 2020, the claimant was absent and did not report to work prior to her assigned shift.

On May 18, 2020, the claimant was 18 minutes late to her assignment.

On May 20, 2020, the claimant was one hour and twenty-five minutes late for her assignment. That same day, the claimant received a warning for attendance. The warning said that future occurrences would lead to termination. (Exhibit 5)

On May 27, 2020, the claimant was 35 minutes late for her assignment.

On May 20, 2020, the claimant received a written warning for being one hour late to work that morning.

On June 9, 2020, the claimant was absent and did not report to work prior to her assigned shift. Later that day, the claimant told Ms. Naughton she was having a "mental breakdown."

On June 10, 2020, the claimant received a final warning notice referencing the June 9, 2020 attendance incident described above. The final warning said several times that more absences would result in termination. (Exhibit 6)

On June 21, 2020, the claimant and her husband, Michael Tremaine, met with Ms. Naughton discuss options. The claimant and Mr. Tremaine wanted to qualify for FMLA. At the time, Mr. Tremaine's cancer treatments required them to drive out of town six days out of the week. Ultimately, Ms. Naughton and the claimant agreed to schedule her only on Sundays. The employer also relaxed its notice policy to "as much notice as possible" to give the claimant more flexibility.

On July 5, 2020, the claimant did not report to a swing shift assignment at Menards. The claimant did not give notice prior to her scheduled start time. Ms. Naughton became aware because Menards said no one had been at the building to remove garbage and perform other cleaning services.

On July 6, 2020, the employer terminated the claimant. (Exhibit 1) The employer provided a copy of the termination notice which states the claimant was terminated because of the no call/no show that occurred on July 5, 2020. It stressed that the claimant had been warned about attendance in the past many times.

In August 2020, the claimant's schedule was no longer restricted by the need to attend Mr. Tremaine's cancer treatments.

The employer provided its statement included at fact-finding. (Exhibit 3)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for willful 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) 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.

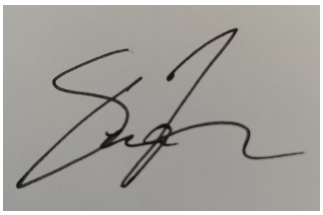
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited 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; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work.

The claimant contends she had reasonable grounds for being absent or tardy because she was attending her husband's cancer treatments. While this would be a reasonable ground, absences also must be reported to be excused. The claimant did not contend she properly reported the attendance incidents she accrued. The final three months of her shift she was tardy six times with some tardy incidents being more than an hour in duration. She also had four instances in which she failed to report to work for assigned shifts. Benefits are withheld.

DECISION:

The October 28, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for willful misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



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February 19, 2021
Decision Dated and Mailed

smn/kmj