IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

COLLEEN MONROE Claimant **CONNECTIONS REAL ESTATE GROUP PL** Employer	**APPEAL 21A-UI-03601-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/29/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Colleen Monroe, the claimant/appellant, filed an appeal from the January 14, 2021, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 29, 2021. Ms. Monroe participated and testified. The employer participated through Katie Underberg, co-owner and manager. Claimant' Exhibits A-E were admitted into evidence.

ISSUE:

Was Ms. Monroe discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Monroe began working for the employer on July 16, 2020. She worked as a part-time office manager. Effective August 1, 2020, Ms. Monroe began working as a full-time office manager. Ms. Monroe's employment was terminated on October 26, 2020.

The employer's policy provides that employees must contact their supervisor if the employee will be late or absent from work. Scott Underberg was Ms. Monroe's direct supervisor.

Ms. Monroe was issue a warning on September 28 for being late on September 23. Ms. Monroe did not notify the employer beforehand that she had a doctor's appointment. Ms. Monroe attended work after her doctor's appointment.

On September 30, Ms. Monroe found out that she was exposed to someone who had tested positive for COVID-19. Ms. Monroe informed the employer. Mr. Underberg told Ms. Monroe to stay home until she was tested and received her results. Ms. Monroe took a COVID-19 test that day. Ms. Monroe's doctor gave her a note dated September 30 that excused her from work until she received her tests results and she was symptom free. Ms. Monroe received her test results on October 2. Ms. Monroe did not provide the doctor's note to the employer nor did she call in on October 1 or October 2.

Ms. Monroe was written up on October 5 for excessive absences. Ms. Monroe informed the employer about her September 30 doctor visit and doctor's note. The employer informed Ms. Monroe that, going forward, she would be required to provide a doctor's note for any absences for which she was sick. The employer also asked Ms. Monroe to provide a doctor's note for her October 30 absence. Ms. Monroe copied and pasted the text of the doctor's note and sent the text to the employer. The employer asked Ms. Monroe to provide the actual doctor's note. Ms. Monroe took a picture of the doctor's note and sent that to the employer. Prior to the October 5 meeting, Ms. Monroe had not provided doctor's note to the employer.

Ms. Monroe was sick on October 20. She called in that day. Ms. Monroe was tested for COVID-19 that day and the doctor gave her a note excusing her from work until she received a negative test result and was symptom free. Ms. Monroe sent the doctor's note to the employer. Ms. Monroe received a negative test result on October 23.

Ms. Monroe was sick on October 26. She went to the doctor and received a note excusing her from work until October 28. Ms. Monroe sent the doctor's note to the employer. That evening, Mr. Underberg called Ms. Monroe and told her that her employment was terminated because the employer needed someone who could be in the office and not be absent so much.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Monroe was discharged from employment for no disqualifying reason.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 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.

Iowa Admin. Code r. 871-24.32(8) provides:

> (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.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The findings of fact show how the administrative law has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used his own common sense and experience.

The employer has the burden of proof in establishing disqualifying job misconduct. *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. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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 9; *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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

In this case, Ms. Monroe was absent because she was sick. Although she did not provide doctor's notes to the employer or provide them in the format the employer preferred, she did notify the employer when she was absent. Since Ms. Monroe reported her absences and they were because she was sick, her absences are excused. Excused absences are not misconduct. Benefits are allowed.

DECISION:

The January 14, 2021, (reference 01) unemployment insurance decision is reversed. Ms. Monroe 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.

Daniel Zeno
Administrative Law Judge

March 31, 2021
Decision Dated and Mailed

dz/ol