IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TRACY L HOSKINS Claimant **WHIRLPOOL CORPORATION** Employer	**APPEAL 17A-UI-05539-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/30/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the May 19, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 12, 2017. Claimant participated. James Jackson testified on claimant's behalf. Maxwell Woods registered for the hearing on claimant's behalf, but claimant elected not to have Mr. Woods contacted. Employer participated through human resources specialist Eric McGarvey and production supervisor Brad Patterson. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a machine refrigeration specialist from July 2, 2013, and was separated from employment on May 4, 2017, when she was discharged.

The employer has an attendance policy which based on an accumulation of day and half day absences, including absences, leaving early, and tardies, regardless of reason for the infraction. The policy also provides that an employee will be warned as absence days are accumulated, and will be discharged upon receiving eight days of absences. The employer requires employees contact the employer's automated line and report their absence at least thirty minutes prior to the start of their shift. Claimant was aware of the employer's policy.

On April 27, 2017, claimant started working her scheduled shift, but she left before the end of her shift. While claimant was working, she received a text message that her daughter was in the hospital. Claimant told a team leader that she had to leave early because her daughter was in the hospital. The team leader brought claimant an exit pass. Claimant then filled out another form and dropped everything off at human resources.

Claimant's daughter was released from the hospital on May 1, 2017. On May 1, 2, 3 and 4, 2017, claimant properly reported to the employer that she would absent due to personal. Employees use personal on the automated call off line for illness (employee or family), transportation issues, etc. Claimant was absent because of her daughter's illness on May 1, 2, 3 and 4, 2017. Claimant could not take her daughter to daycare because her daughter was sick. Mr. Jackson testified he car pools with claimant and that he was unable to work the week of May 1, 2017 because it was claimant's turn to drive and his car was broke down. Mr. Jackson testified that claimant notified him about her daughter's illness and she would not be going to work during this time period. On May 4, 2017, claimant was absent because there was a follow-up doctor appointment regarding her daughter's medication. Claimant contacted Mr. McGarvey around 11:30 a.m. and asked him if she was discharged because she was planning on returning to work on May 8, 2017. Mr. McGarvey reviewed claimant's attendance record and told her she had missed too many days. Mr. McGarvey told claimant she was discharged and she needed to speak to Sue (a different human resources specialist) because Sue handles discharges for the employer. Sue also told claimant that she was discharged.

Claimant was last warned on April 6, 2017, that she faced termination from employment upon another incident of unexcused absenteeism. Claimant was absent on April 3 and 4, 2017 because she thought she had been approved for vacation, but when she returned to work she discovered her vacation request had been denied. Claimant was also issued a written warning for her attendance infractions on March 1, 2017.

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 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.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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.* However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743 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 absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Where an employer is aware of the nature of the claimant's illness and has fair warning that he may be absent for an extended period of time due to that illness, failure of the employee to contact the employer is not misconduct as the absences are excused. This is so where the claimant had no telephone and was bedridden with scarlet fever. *Floyd v. Iowa Dep't of Job Serv.*, 338 N.W.2d 536 (Iowa Ct. App. 1983).

The employer's argument that claimant was calling in absent until she was discharged because she did not like her new job duties is not persuasive. Although claimant did not like her job duties, she did credibly testify she was not trying to get discharged. Furthermore, Mr. Jackson credibly testified that claimant's daughter was ill during the week of May 1, 2017, which caused claimant to be unable to fulfill her carpool driving duties and he had to miss work that week.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant had to leave work early on April 27, 2017, due to her daughter's hospitalization. Claimant properly

notified her team lead of why she was leaving early. Claimant then was off work from May 1, 2017 through May 4, 2017 as a result of her daughter's illness. Claimant properly notified the employer regarding about her absences. Although generally childcare is a personal responsibility, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). Claimant credibly testified that the daycare would not take her daughter because of her daughter's illness, so she had to stay with her daughter from May 1, 2017 through May 4, 2017. From May 1, 2017 through May 4, 2017, claimant was not absent from work because she did not make arrangements for childcare, she was absent because her normal arrangement (daycare) would not accept her daughter while her daughter was ill. Because claimant's last absences were related to properly reported illness or other reasonable grounds (her daughter's hospitalization and illness), no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The May 19, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs