IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MICHAEL J GRIMM Claimant **WHIRLPOOL CORPORATION** Employer	**APPEAL 18A-UI-11846-AW-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/04/18** **Claimant: Appellant (2)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Michael Grimm, Claimant, filed an appeal from the November 30, 2018 (reference 02) unemployment insurance decision that denied benefits because he voluntarily quit work with Whirlpool Corporation by failing to report to work for three days in a row without notifying his employer. The parties were properly notified of the hearing. A telephone hearing was held on December 26, 2018 at 9:00 a.m. Claimant participated. Employer did not participate. Claimant's Exhibits A – D were admitted. Official notice of the administrative record was taken.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct or a voluntary quit without good cause attributable to the employer.

FINDINGS OF FACT:

As claimant was the only witness, the administrative law judge makes the following findings of fact based solely upon claimant's testimony: Claimant was employed full-time as a Second Class Inspector from July 17, 2017 until his employment with Whirlpool Corporation ended on October 16, 2018.

Claimant went to the doctor on Tuesday, October 2, 2018 due to an ongoing illness. Claimant's doctor suggested claimant take the rest of the month off of work, returning to work November 5, 2018. After the doctor's appointment, claimant called Matrix, employer's FMLA provider; Matrix said it would send the necessary paperwork to claimant's doctor to complete and return. On Monday, October 8, 2018, Matrix notified claimant that it had not received the completed paperwork from claimant's doctor. Because claimant's doctor was on vacation, he scheduled an appointment with another doctor at the office for Tuesday, October 9, 2018. At claimant's appointment on October 9th, claimant told the new doctor that his primary doctor determined claimant should not return to work until November 5th. Claimant believed the new doctor was in agreement. On October 15, 2018, claimant received an automated message from Matrix stating that his FMLA request had been approved. The message did not state the effective dates of claimant's approved leave.

On November 5, 2018, claimant returned to work and was informed that his employment had ended. Employer told claimant that employer considered claimant to have voluntarily quit by failing to report to work for three consecutive shifts without notice. Claimant contacted Matrix that same day and was told that the new doctor completed the FMLA request for the remainder of the week – not the remainder of the month. Claimant notified employer of his absences each day from October 2, 2018 through October 12, 2018. After receiving the message from Matrix on October 15, 2018, claimant did not believe continued calls to employer were necessary. Claimant had no intention of quitting his job.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(1)(d) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
> 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. But the individual shall not be disqualified if the department finds that:
> *d*. The individual left employment because of illness, injury, or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(4), (35) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.
>
> (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:
> *a*. obtain the advice of a licensed and practicing physician;
> *b*. Obtain certification of release of work from a licenses and practicing physician;
> *c*. Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
> *d*. fully recover so that the claimant could perform all of the duties of the job.

Claimant did not voluntarily quit or abandon his employment. Claimant was absent from his employment due to a non-work-related illness, obtained the advice of a physician, and notified his employer of his absence through employer's FMLA provider. Claimant had a good faith belief that his medical leave was approved by employer. When claimant returned to work on the date stated by his primary physician, he was informed that the employer believed he had voluntarily quit by failing to report to work for three consecutive shifts without notice. Claimant had no intention of terminating his employment relationship with employer. Claimant's return to work with this employer on November 5, 2018 shows his intention to continue his employment relationship with employer.

Furthermore, claimant notified his employer of his absences each day from October 2, 2018 through October 12, 2018. Claimant did not notify his employer of his absences on October 15, 2018 or October 16, 2018 and was discharged October 16, 2018. Notwithstanding his good faith belief that he was on approved medical leave, claimant was not absent from work for three days without notice in violation of a company rule. At most, claimant was absent for two days (October 15, 2018 and October 16, 2018) without notice before his employment ended. The separation was not a voluntary quit; therefore, it was a discharge.

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 disqualification shall continue 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:

> 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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 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. 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.

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.

As discussed above, claimant was not absent from work for three consecutive shifts without notice in violation of employer's policy. In addition, claimant's absence from work from October 2, 2018 through October 16, 2018 is not excessive unexcused absenteeism. Claimant's absences were due to illness. Claimant properly reported his absences from October 2, 2018 through October 12, 2018. Claimant did not report his absences on October 15, 2018 and October 16, 2018; however, this was due to claimant's good faith belief that he was on approved medical leave and no longer needed to report his absences each day. Claimant's confusion is attributable to employer's FMLA provider's automated message system that informs employees that their FMLA request was approved but does not inform the employee of the effective dates of the leave. Claimant returned to work on the date he believed was approved by his doctor. Claimant's failure to return to work prior to November 5, 2018 was

not a willful or wanton disregard of employer's interests; claimant did not deliberately violate or disregard standards of behavior employer had a right to expect of him.

Employer has not met its burden to prove a disqualifying reason for separation. Benefits are allowed, if claimant is otherwise eligible.

DECISION:

The November 30, 2018 (reference 02) unemployment insurance decision is reversed. Benefits are allowed provided claimant is otherwise eligible.

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Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/rvs