IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOCELYN P WATERBURY Claimant **LAKESIDE LUTHERAN HOME** Employer	**APPEAL 20A-UI-01742-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/02/20** **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/appellant filed an appeal from the February 19, 2020 (reference 01) unemployment insurance decision that found the claimant was eligible for unemployment insurance benefits after her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on March 13, 2020. The claimant, Jocelyn P. Waterbury, was represented by Charlie Waterbury and participated personally. The employer, Lakeside Lutheran Home, participated through witness Jessica Christensen. Jaime Dodd and Janice Kunz observed on behalf of the employer. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 certified nursing assistant ("CNA") at the employer's long term care facility. She was employed from December 14, 2018 until February 3, 2020. Her work schedule varied. Her job duties included caring for patients. Claimant's immediate supervisor was Jessica Christensen.

The employer has a written attendance policy. Claimant received a copy of the policy upon hire. The attendance policy provides that an employee may have eight absences prior to being subject to discharge from employment. The policy provides that an employee must provide at least a two-hour notice prior to a scheduled work shift if they are going to be absent from work.

The final absence leading to the claimant's discharge occurred on February 3, 2020. Claimant had been ill but had failed to provide the employer with a doctor's note stating that she had been

released to work without any medical restrictions. On February 1, 2020, claimant had come to work but did not have the correct doctor's note and was sent home. Claimant believed that her mother had already faxed the doctor's note to the employer but it had not received it. Claimant again showed up to work on February 2, 2020 believing that her mother had faxed the correct note to the employer that released her to return to work. However, the note did not state that she was released to return to work, it only stated that she had been seen by the doctor. She was sent home on February 2, 2020 for not having a proper release to return to work. Because it was the weekend, she was unable to get in contact with her doctor to get a different note until February 3, 2020. The proper note was not provided to the employer until after her shift started on February 3, 2020. Claimant had spoken with Stephanie, the scheduler, to be late to work on February 3, 2020 so that she could obtain proper documentation to return to work. Claimant was discharged when she returned to work on February 3, 2020.

Claimant's previous absences from work included being tardy on September 1, 2019 because her car would not start; being ill on September 29, 2019 when she was sent home by the employer; being absent on October 20, 2019 due to a family member having health issues, which she properly notified the employer about; being ill on December 24, 2019 when she was sent home by the employer; being ill on December 26, 2019 due to personal illness when she was sent home by the employer; failing to come to work or call in for work on January 19, 2020 or January 20, 2020 following the expiration of her medical leave of absence; being sent home from work due to illness on January 29, 2020; and being absent on January 30, 2020 due to a medical appointment, which she notified the employer about the day prior on January 29, 2020.

Following her medical leave, which expired on January 18, 2020, the claimant was never instructed that she was scheduled for work shifts on January 19, 2020 or January 20, 2020 and did not come to work or call the employer. She was not notified that her leave of absence expired on January 18, 2020.

Claimant has received unemployment insurance benefits of $873.00 for the weeks between February 2, 2020 and February 29 2020. The employer participated by telephone in the fact finding interview.

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, provided the claimant is otherwise eligible.

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(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id*. at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. 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. *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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). 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." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

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.*, 321 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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case, the only unexcused absence was on September 1, 2019 when the claimant was tardy to work due to transportation issues. The other absences were all due to properly reported illnesses or doctor's appointments. Claimant's absences on January 19, 2020 and January 20, 2020 were due to the employer failing to notify her that she was scheduled to work. Claimant was not provided with paperwork documenting her return to work date.

Her absences on February 1, 2, and 3, 2020 were due to the employer failing to allow her to work because she did not have proper medical documentation informing the employer that she was released to work without restrictions. Because of confusion in what the doctor's note actually needed to say, and the fact it was the weekend, claimant attempted to comply with the employer's requirements as soon as possible. She was able to provide the appropriate

documentation on February 3, 2020; however, the decision had already been made to discharge her from employment. Because the employer did not let her work February 1, 2, and 3, 2020 when she showed up to work, those absences cannot be considered unexcused. As such, one unexcused absence is not considered excessive.

However, the employer may argue that the claimant's failure to obtain a proper doctor's note rose to the level of insubordination. Insubordination can manifest in several different ways. An employer has the right to expect an employee to follow reasonable directions. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Id*. Misconduct can be found when a claimant was discharged for refusing to complete job tasks after his shift because he created the extra job tasks by working too slow. *Boyd v. Iowa Dept. of Job Serv.*, 377 N.W.2d 1 (Iowa Ct. App. 1985). Continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). For example, the refusal of a prison guard to answer questions on his private drug use constitutes job misconduct since the prison's rule requiring him to disclose this information was necessary to the functioning of the prison system. *Ross v. Iowa State Penitentiary*, 376 N.W.2d 642 (Iowa App. 1985). However, if the request was unreasonable or the claimant had a good faith belief or good cause to refuse the request, no misconduct would be found. *Woods v. Iowa Department of Job Service,* 327 N.W.2d 768, 771 (Iowa Ct.App.1982)(an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause). An instruction is reasonable if it presents no hardship to the employee and no threat to his or her health, safety, or morals. *Endicott v. Iowa Dep't of Job Services*, 367 N.W.2d 300, 304 (Iowa App. 1985)(finding misconduct based on employee's unreasonable refusal to work overtime after employer's short-notice request).

In this case, the claimant was clearly attempting to comply with the employer's reasonable request that she have a doctor's note provided that released her to return to work without restrictions. However, there is no evidence of any willful misconduct on behalf of the claimant. She was speaking to her doctor and her mother attempted to have the note faxed to the employer. She immediately contacted the doctor's office following the weekend to secure a different note. She was able to secure a sufficient note by February 3, 2020. Claimant's failure to obtain proper medical documentation from February 1, 2020 through February 3, 2020, given that the doctor's office was not open on February 2, 2020, does not establish willful insubordination.

As such, without establishing a current act of job-related misconduct, this separation from employment is not disqualifying. Benefits are allowed, provided the claimant is otherwise eligible. Because benefits are allowed, the issue of overpayment is moot. The employer's account may be charged for benefits paid.

DECISION:

The February 19, 2020 (reference 01) unemployment insurance decision allowing benefits is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/scn