IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ERIKA REESE Claimant **EGS CUSTOMER CARE INC** Employer	**APPEAL 16A-UI-04794-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/27/16** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the April 12, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment for excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on May 10, 2016. The claimant, Erika Reese, participated personally. The employer, EGS Customer Care Inc., participated through Human Resources Generalist Turkessa Newsone and Team Lead Wendy Auliff. Claimant's Exhibit A was admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a customer service representative. She was employed from August 25, 2014 until January 19, 2016. Her job duties included receiving inbound calls regarding customer issues. She was working 8:00 a.m. to 6:30 p.m. Mondays through Thursdays. Ms. Auliff was her immediate supervisor.

The claimant has an illness in which she has an Americans with Disabilities Act ("ADA") accommodation that excuses her from work if she is ill. Claimant was also eligible for leave under the Family and Medical Leave Act ("FMLA") due to the health conditions of her 17-year-old child as set forth in Exhibit A. From December of 2015 through January 12, 2016 claimant had several absences. Some of her absences were related to her own illness, others were related to caring for her child, and others were for various reasons.

On December 17, 2015 claimant was absent from work because her 14-year-old child had a doctor's appointment. Claimant did properly report this absence but this leave was not approved under the employer's policies, claimant's ADA accommodation or her approved FMLA leave.

On December 29, 2015 claimant was absent from work. She did properly report this absence but this leave was not approved under the employer's polices, claimant's ADA accommodation or her approved FMLA leave. Claimant attended a doctor's appointment for her 14-year-old child in the morning at 11:30 a.m. Claimant then had an appointment for her 17-year-old child to attend in the afternoon.

On December 30, 2015 claimant did not call in or come to work. Claimant tried to call in but no one answered her call and then she forgot to call later in the day. Claimant did not work that day due to her own health issues.

On December 31, 2015 claimant's FMLA eligibility for approved leave relating to her 17-year-old child expired. Claimant had notice of this expiration when she received the paperwork approving her leave several months prior.

On January 4, 2016 claimant was absent from work. Claimant's 17-year-old child had a doctor's appointment at 9:15 a.m. and 1:00 p.m. and her 14-year-old child had an appointment at 3:30 p.m. This absence was not excused because claimant's FMLA leave had expired for her 17-year-old child.

On January 6, 2016 claimant was absent from work. She was absent because her 14-year-old child had a medical appointment at 4:00 p.m. that day. This leave was considered unexcused.

On January 7, 2016 claimant was presented with a final warning for attendance. She refused to sign it on this date because she wanted her supervisor to verify that her ADA and FMLA leave had not been counted as unexcused absences. Claimant was again reminded on this date that she no longer qualified for FMLA leave because she had not worked enough hours in the previous 12 months to qualify.

On January 12, 2016 claimant was presented with the final warning for attendance again and was told that the employer verified all absences. Claimant signed the final warning and at that time reported to Ms. Auliff that she would be leaving that day in order to arrive in time for her 17-year-old child to get off of the school bus. Her 17-year-old child requires supervision at all times.

Ms. Auliff verbally warned her that if she left she would be subject to discharge because it would be considered another attendance policy violation since she no longer had FMLA approved leave. Claimant decided to leave that day at 2:22 p.m. when she was scheduled to work until 6:30 p.m.

Claimant was discharged on January 19, 2016 for her attendance violation on January 12, 2016. The delay in discharge was due to the fact that claimant called in and reported she was ill on January 13, 14, and 18, 2016. January 19, 2016 was the next opportunity that the employer had to speak to her about her policy violation.

This employer has a written policy regarding attendance. Claimant was given a copy of the policy and it was verbally discussed with her during meetings and a presentation. Claimant also received a final written warning regarding her attendance on January 7, 2016 and again on January 12, 2016. This final written warning informed claimant that she would be subject to

discharge should she miss more than two hours during any further shifts in a 90-day time period. Claimant was also verbally warned by Ms. Auliff when claimant told her she intended to leave on January 12, 2016 that it would be considered as unexcused and could subject her to discharge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

As a preliminary matter, I find that claimant did not quit. Claimant was discharged from employment for job-related 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(4) provides:

> (4) Report required. The claimant's statement and the 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.

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 claimant had a final written warning regarding her attendance presented to her on January 7, 2016. The claimant knew that she needed to come to work on time and stay for her entire shift. Claimant had known that her FMLA leave would expire on December 31, 2015 and was reminded again on January 7, 2016. Further, claimant was verbally warned by Ms. Auliff on January 12, 2016 that if she left early that day she would be subject to discharge.

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); *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 is not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984)(emphasis added). 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 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.

Claimant's unexcused absences include December 17, 2015; December 29, 2015; December 30, 2015; January 4, 2016; January 6, 2016; and January 12, 2016. These are unexcused because they were not for reasonable grounds. The December 30, 2015 incident was not properly reported. Claimant was on notice that her FMLA leave for her daughter had expired

because she failed to meet the eligibility requirements. Claimant could have made other arrangements for her daughter's care but did not.

Excessive absenteeism has been found when there has 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). The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on January 12, 2016 was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The April 12, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related 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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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs