IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DANIELLE FERRY Claimant **SHIVAM HOSPITALITY INC** Employer	**APPEAL 18A-UI-04764-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/11/18** **Claimant: Appellant (2R)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 9, 2018, (reference 05) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on May 14, 2018. Claimant participated. Employer participated through assistant manager Ash Vaidya. Department's Exhibits D-1 through D-3 were received.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision was mailed to the claimant's last known address of record on April 9, 2018. Claimant received the decision within the appeal period. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by April 19, 2018. The appeal was not filed until April 20, 2018, which is after the date noticed on the unemployment insurance decision because when claimant emailed her appeal on April 19, 2018, she entered the email address incorrectly. Claimant became aware of this on April 20, 2018, and immediately resubmitted her appeal.

Claimant began working for employer on April 2, 2016. Claimant last worked as a full-time front desk associate. Claimant was separated from employment on February 23, 2018, when she was terminated.

Claimant began missing a lot of work in February 2018. Claimant was absent on February 6, 7, and 8, 2018, due to weather and/or illness.

Claimant was absent from February 12 through 16, 2018, due to her son's illness. On February 14, 2018, claimant sent a text message to assistant manager Ash Vaidya with pictures

of doctor's notes excusing her from work on these dates. On February 14, 2018, claimant also informed Vaidya that she would not be able to come into work until further notice due to the serious illness of her son.

On February 19, 2018, Vaidya contacted claimant's medical provider to verify the doctor's notes. The medical provider sent only one note that excused claimant from work on February 12 and 13, 2018. At this time, Vaidya did not believe claimant had an adequate reason to continue to miss work. On February 19, 2018, Vaidya asked claimant to bring in hard copies of the doctor's notes. Claimant responded that she did not believe she could bring them in that day due to the weather, but would bring them in on Friday, February 23, 2018, when she picked up her paycheck.

Claimant was absent from February 19 through 23, 2018, due to her son's illness.

On February 23, 2018, Vaidya left claimant a voice message stating it was not working out and terminating claimant's employment.

Claimant had never been previously warned regarding her attendance.

Claimant's son was not able to return to school until April 4, 2018. During that time, claimant was at home with him closely monitoring his health and she had no other friend or family member available to monitor him. No initial determination has been made by the Benefits Bureau of Iowa Workforce Development regarding whether claimant was able to and available for work from March 11 through April 4, 2018, due to her caregiving responsibilities.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

> The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The appellant filed an appeal in a timely manner but it was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was separated from employment for disqualifying reasons.

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

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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.*, 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. 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). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

In this case, claimant had a number of absences which would be considered unexcused for purposes of unemployment law. However, employer had not previously warned claimant about the issue leading to the separation. Therefore, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

DECISION:

The April 9, 2018, (reference 05) unemployment insurance decision is reversed. The appeal is timely. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

REMAND:

This issue of whether claimant was able to and available for work from March 11 through April 4, 2018, due to her caregiving responsibilities is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

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Decision Dated and Mailed

cal/scn