IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RANDI L SHEVER Claimant **CARE INITIATIVES** Employer	**APPEAL 16A-UI-07671-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/12/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 5, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 1, 2016. Claimant participated. Employer participated through representative Jacqueline Jones and administrator Nancy Snyder.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a lead cook from October 21, 2011, and was separated from employment on June 15, 2016.

On June 15, 2016, the employer discharged claimant because of job abandonment. The employer has a written attendance policy. The policy provides that employees are to notify their supervisor two hours prior to the start of their shift if they are sick and are going to be absent. The policy also provides that employees are to help find their replacement. Employees are warned as the accumulated absences; a verbal coaching at seven absences, a written warning at eight absences, a final warning at nine absences, and discharge at ten absences. Claimant was aware of the policies. The employer does not require a doctor's note if an employee is sick.

On June 15, 2016, claimant was scheduled to work and arrived on time. Ms. Snyder received a text message from claimant at 7:02 a.m. Claimant stated that she was not feeling well, Heather (dining services manager from another facility) was at the employer, and she was heading home. Heather was at the employer to help get the kitchen back in compliance before its next review. Ms. Snyder texted claimant back ok. When Ms. Snyder got to work, she spoke to staff to make sure everything was covered. Ms. Snyder asked the staff if claimant was actually sick

and they stated she was not sick. The staff stated claimant walked in and stated “guess I’ll go home, Heather is here.” Ms. Snyder then spoke to her boss (divisional director) about claimant’s attendance issues. Ms. Snyder then called claimant and told her she was discharged because of job abandonment. Ms. Snyder did not ask claimant if she was sick.

On April 29, 2013, the employer gave claimant a verbal coaching for attendance issues. On March 18, 2016, Ms. Snyder gave claimant a verbal coaching for attendance issues. Claimant was not warned that her job was in jeopardy for attendance. After March 18, 2016, claimant had further absences, but no further warnings. Claimant did not have any prior warnings for job performance. Claimant had left early on occasion prior to June 15, 2016.

REASONING AND CONCLUSIONS OF LAW:

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

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.
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> 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(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.

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 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). 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.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.*, 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.

On June 15, 2016, claimant did not notify the employer she was going to be absent prior to the start of her shift because she attempted to work her scheduled shift. Once claimant arrived at work, she discovered an additional employee was present that could cover her shift and she then notified Ms. Snyder that she was leaving because she was sick. Ms. Snyder then responded ok, essentially approving her absence. Once Ms. Snyder arrived at work on June 15, 2016, she discovered that the staff did not believe that claimant was sick. Ms. Snyder did not contact claimant to request a doctor's note or to confirm she was sick. Ms. Snyder conferred with her supervisor and the decision was made to discharge claimant because of job abandonment; however, no evidence was presented at the hearing that claimant was intending to abandon her job. Claimant had notified the employer of the reason for her absence (illness) and although the employer received contradictory information from other employees, the employer failed to follow up with claimant about whether she was actually sick. It is noted that the only time Ms. Snyder spoke to claimant on June 15, 2016, she did not ask claimant if she was sick.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence was related to properly reported illness or other reasonable grounds, 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.

Furthermore, although an employer's absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged claimant contrary to the terms of its own policy, which does not call for termination until after a written warning and final warning are given. The employer had only given claimant a verbal coaching about her attendance issues. Although claimant may have had other absences after her verbal coaching, the employer did not discipline her for those absences. 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. Thus, since the consequence of discharge was more severe than other employees would receive for similar conduct by the terms of the policy, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The July 5, 2016, (reference 01) unemployment insurance decision is reversed. 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/pjs