IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SHANA HOLMES Claimant **MIDWEST JANITORIAL SERVICE INC** Employer	**APPEAL 21A-UI-10490-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/19/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 22, 2021, (reference 08) unemployment insurance decision that denied benefits based upon her voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on June 30, 2021. Claimant participated and testified. The claimant was represented by Teri Smitz, attorney at law. Employer participated through Director of Administration Erin Decker. This hearing was conducted jointly with 21A-UI-10491-SN-T. Official notice was taken of the administrative records. Exhibits A and B were received into the record.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed part-time as a janitor from July 23, 2018, until she was separated from employment on September 8, 2020, when she was terminated. The claimant's immediate supervisor was Branch Manager Doreen Davis.

The employer has an attendance policy that is outlined in its employee handbook. The attendance policy states that if an employee does not arrive at an assignment and does not report they will be absent to their supervisor, then they will be considered to have abandoned their job. The claimant received a copy of the employee handbook at the time of her hire.

The claimant provided payroll records to show that she had been working assignments at varying times of day from June 15, 2020 to August 31, 2020. (Exhibit A)

On August 12, 2020, Ms. Davis asked the claimant to send the dates and times she performed cleaning at an assignment to corporate because there was a glitch in the system. The claimant

sent a message stating when she worked at the Farm Bureau assignment. Ms. Davis responded that she should be sending in this information until the glitch was fixed. Ms. Davis asked the claimant when she performed the assignment on August 10, 2020.

On August 17, 2020, the claimant sent a text message to Ms. Davis with the date and time that she cleaned the Airgas assignment.

On August 18, 2020, Ms. Davis told the claimant that she needed the information regarding the hours she worked on August 17, 2020. The claimant sent in response the times she cleaned the Sara Lee assignment.

On August 19, 2020, the claimant sent a text message to Ms. Davis informing her that she was unable to clean the Farm Bureau building that night because her car would not start. The claimant asked if she could clean the building on the following day. Ms. Davis asked the claimant why she was waiting so long to clean the buildings. Ms. Davis said she should have contacted other employees if she was not able to clean the building. Ms. Davis said that she should clean the building no later than 8:00 p.m. that night. A few minutes later, the claimant explained her car would not start at that Airline assignment and conveyed her request to be removed from the Farm Bureau assignment in the future.

On August 21, 2020, the Ms. Davis asked the claimant if she would be willing to clean the Airgas building that night. The claimant said she would take that assignment."

On August 31, 2020, the claimant sent a text message to Ms. Davis asking if there was a way to contact corporate. The claimant explained when she arrived to clean the Sara Lee and Airgas buildings, someone else was already cleaning them. Ms. Davis asked the claimant to meet with her at 1:00 p.m., so that they could discuss this issue. Ms. Davis said that she had been trying to contact the claimant. The claimant replied that she had not received calls or text messages from Ms. Davis. The claimant reiterated her request for contact information to contact corporate. The claimant also told Ms. Davis that she could not come in at 1:00 p.m. because she had to take a relative to a doctor's appointment. Ms. Davis said the claimant would need to come in because the storm had knocked the phones down. Ms. Davis explained that the employer thought the claimant had abandoned her job. The claimant said she had to schedule that meeting for another day because she had to run another relative to an appointment. Ms. Davis said she would be available to meet until 5:30 p.m. that day. Ms. Davis asked if the claimant was going to clean the Sara Lee building that night. The claimant cleaned the Sara Lee building that night and sent a text message to Ms. Davis providing the date and time of cleanings occurring there that night and on August 27, 2020.

On September 1, 2020, Ms. Davis sent a text message to the claimant stating that the employer's time clock had been fixed. Ms. Davis added that she had the claimant's time from the clock out system.

On September 3, 2020, the claimant sent a picture by text message of a work truck to Ms. Davis with the following message, "Am I still working for [the employer]? Once again, I arrive at my building (Sara Lee) and someone is here cleaning it. Thanks." The claimant requested the information to contact corporate in a follow up message. Ms. Davis replied that the supervisors track when assignments are completed and if they are not completed by the end of the employee's shift, then an alternate is assigned to clean them.

On September 8, 2020, Ms. Davis sent a text message to the claimant stating she talked to the other employee who had been cleaning the Sara Lee building and asked him to contact the

claimant prior to cleaning the building. The claimant replied she did not understand the message. Ms. Davis clarified that she was trying to correct the claimant's concern about arriving at the location and finding someone else cleaning it. Later that day, Ms. Davis and the claimant spoke on the phone. On the phone call, the claimant expressed that she would like to be assigned to other buildings to accommodate her schedule. Ms. Davis said she would be contacting the claimant about assigning her to different buildings that would work with her schedule.

On September 9, 2020, the employer determined the claimant had abandoned her job because she had not checked in or requested new assignments.

The claimant had not received any formal discipline regarding attendance. Nor had Ms. Davis expressed to the claimant orally that her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge as a preliminary matter concludes the employer discharged the claimant. The administrative law judge further concludes the claimant was discharged for non-disqualifying conduct.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 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.

Iowa Admin. Code r. 871-24.25 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 the employer in violation of [a] company rule.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness

has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

In particular, the administrative law judge finds the claimant's allegation that Ms. Davis would get in contact with her regarding new assignments credible. As observed by the claimant's attorney, the claimant is the only one who testified with personal knowledge regarding her final conversations with Ms. Davis. Administrator Erin Decker explained Ms. Davis was not able to testify because she worked the previous late night shift and it would be difficult to make an 8:00 a.m. hearing. The administrative law judge recommends requesting a postponement if a crucial eye witness is not able to make the scheduled hearing time. Without Ms. Davis' testimony, the claimant's allegation that she was going to hear back from Ms. Davis regarding future assignments is un-rebutted.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

The text messages the claimant provided show there was a misunderstanding regarding clock in and clock out procedures. They do not show the claimant was seeking to end the employment relationship. Indeed, the claimant repeatedly asked for the corporate number to clarify why someone else was cleaning her buildings. The claimant also replied contemporaneously to Ms. Davis' text messages. In the absence of any eye witness testimony rebutting the claimant's allegation she was told to wait to hear back from Ms. Davis regarding different assignments, the administrative law judge cannot find the claimant voluntary resigned.

The administrative law judge will now evaluate this case as a discharge.

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:
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> 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(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.

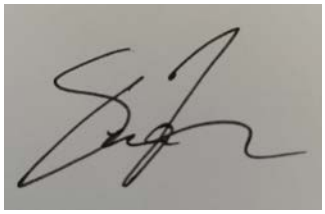
Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 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. 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 are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). 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).

In this case, the employer acknowledges the claimant was not formally warned prior to being terminated. In fact, the employer concedes the claimant likely did not even know her job was in jeopardy prior to her discharge. As a result, the employer cannot show that she was terminated for willful misconduct. An employee is entitled to fair warning what the employer will not tolerate before separating him or her from employment. Benefits are granted.

DECISION:

The March 22, 2021, (reference 08) unemployment insurance decision is reversed. The claimant was discharged due to non-disqualifying conduct. Benefits are granted, provided she is otherwise eligible.



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July 12, 2021
Decision Dated and Mailed

smn/scn