IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARY L. ZACHMEYER Claimant **CENTRAL IOWA KFC INC.** Employer	**APPEAL 22A-UI-06852-CS-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/20/22** **Claimant: Appellant (5)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On March 18, 2022, the claimant/appellant filed an appeal from the March 15, 2022, (reference 02) unemployment insurance decision that denied benefits based on claimant voluntarily quitting on January 4, 2022, for personal reasons. The parties were properly notified about the hearing. A telephone hearing was held on April 27, 2022. Claimant participated. Employer participated through Area Supervisor, Julie Mangold. Administrative notice was taken of claimant's unemployment insurance benefits records, including WAGE-A. Exhibits 1, 2, 3, 4, and 5 were admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on July 14, 2021. Claimant last worked as a part-time customer service team member. Claimant's last performed work for the employer on December 31, 2021. Wage-A reflects that claimant did not earn wages with the employer in the first quarter in 2022. Claimant was separated from employment on January 8, 2022, when she was terminated for job abandonment.

Claimant had attendance issues while she worked for the employer. Claimant was a no call, no show for her shifts on September 3, 4, 5, 6, 9, and 11, 2021. Employer was going to terminate claimant in September 2021. Claimant asked the employer to give her another chance and allow her to continue working. The employer agreed to allow claimant to continue working if she signed an agreement re-acknowledging the employer's schedule and calling off policies. (Exhibit 4). The employer's attendance policy required team members to find their replacement prior to calling in for a shift if the team member was not able to work their scheduled shift. Team members are also required to call in several hours before their scheduled work even if they find a replacement…. three consecutive no call/no shows will be considered a voluntary termination. (Exhibit 4).

Claimant was notified in the letter that the document was her only warning and that any future violations of the stated policies would result in her termination. This letter was signed by claimant on October 5, 2021. Claimant was originally aware of the schedule and calling off policies when she was re-hired on July 14, 2021. (Exhibit 5).

Claimant was absent from work on January 2, 2022. Claimant originally called in and notified her supervisor she was going to be late. Claimant did not show up for work or call in to notify the employer she would not be at work for the rest of her shift. Claimant was sick and could not work. On January 3, 2022, claimant called the employer and notified them she was sick and would not be at work. On January 4, 2022, claimant was sick and did not go to work. Claimant did not call in to work prior to her shift.

The employer composed two documents that memorialized claimant not calling in or showing up for work on January 2, 2022, and January 4, 2022. (Exhibits 1 and 2).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged from employment due to job-related misconduct. Benefits are denied.

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(4) 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 employer in violation of company rule.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). 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). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992).

In this case the claimant was ill and initially told her employer she would be late and then did not show up. On January 3, 2022, claimant called in prior to her shift and notified them she would not be there because she was sick. Claimant did not call in on January 4, 2022, however, claimant was sick and did not go to work. Claimant was absent for three days however she did provide proper notice to her employer for one of the three days. The administrative law judge finds that claimant did not intent to terminated the employment relationship and as a result did not voluntarily quit her employment. Since claimant did not voluntarily quit her employment the separation must be looked at as a discharge. The burden of proof falls on the employer to prove claimant was discharged 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 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.

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). 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 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).

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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer to be more credible than the claimant. Claimant could not remember dates and there were documents memorializing claimant's absences.

In this case, the claimant had received a written warning on October 5, 2021, putting claimant on notice that future improperly reported absences would lead to her termination. Claimant understood the attendance policy and knew she needed to report any absences prior to her scheduled shift start times and find a replacement. Claimant had two unexcused absences during the week of January 2, 2022. These were allegedly due to illness but not properly reported. Two improperly reported absences in a week is excessive.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incidents on January 2, 2022 and January 4, 2022 were not excused. The final absences, in combination with the claimant's history of unexcused absenteeism amount to job-related misconduct. Benefits are denied.

DECISION:

The March 15, 2022, (reference 02) unemployment insurance decision is MODIFIED WITH NO CHANGE IN EFFECT. The claimant did not voluntarily quit but was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as she is deemed eligible.

Carly Smith
Administrative Law Judge

May 6, 2022

Decision Dated and Mailed

cs/ac

NOTE TO CLAIMANT: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.