IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JAMESIA E GARY Claimant **CONSUMER SAFETY TECHNOLOGY LLC** Employer	**APPEAL 18A-UI-10109-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/09/18** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the September 26, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 22, 2018. Claimant participated and testified. Also present on behalf of the claimant, but not testifying was Wesley Barksdale. Employer participated through Manager of Benefits and Compensation Tiffany Riffle and Customer Experience Supervisor Tabitha Joynes. Employer's Exhibits 1 through 19 and claimant's Exhibits A through C were received into evidence. Official notice was taken of the fact finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 8, 2018. Claimant last worked as a full-time customer experience associate. Claimant was separated from employment on September 12, 2018, when she was discharged.

The employer updated their attendance policy in April 2018. Under the updated policy employees are allowed up to six occurrences in a six month period. After six occurrences termination is possible. The policy dictates employees receive a full occurrence for absences of two hours or more and a half an occurrence for absences between 30 minutes and two hours. Employees less than 30 minutes late to work receive a tardy, which are counted separately from occurrences. The policy also allows employees to flex their time, by working late or on their

days off, up to twice a month. Regularly scheduled time in which employees are not at work, but are approved for flex time are not counted as occurrences, as the schedule hours are worked at a different time. Claimant signed an acknowledgement of the policy on April 30, 2018.

From April 3, 2018 until the time of her separation claimant was absent, late, or left early ten times, for a total of eight occurrences at the time of her separation. The dates of those occurrences were April 3, April 9, May 14, June 29, July 6, July 11, August 13, August 21, September 7, and September 10. Claimant was absent from work on April 9 because her minor child, for whom she is the sole care provider, was sick. Claimant was a no-call/no-show on May 14, but could not recall if or why she was absent that day. On June 29, claimant clocked in an hour late because she was working from home at the time and her internet service provider was experiencing technical difficulties. Claimant was issued written warnings regarding her attendance on April 11, 2018 and August 22, 2018. (Exhibits 2 and 3). Claimant spoke to the employer about possible Family Medical Leave Act (FMLA) covered at the time of her August warning, but was advised that she did not yet qualify. Claimant instead requested a change in her scheduling, which was granted and became effective September 3, 2018.

Claimant was sent an email with her new schedule, which provided different hours on alternating A and B weeks. (Exhibit A). Claimant had Fridays off on A weeks and worked on B weeks. Claimant understood the schedule was effective September 3, but, believed it was an A week, when in reality it was a B week. Claimant came in late and left early on Friday, September 7, 2018 due to confusion with scheduling. Claimant did not realize she needed to be at work until she was contacted by the employer, but had not been able to make childcare arrangements for her minor child and had to leave early. (Exhibit C). On September 10 claimant was an hour late due to a traffic backup caused by a car accident. The remainder of claimant's occurrences were attributable to claimant experiencing symptoms from or needing to attend doctor's appointments to treat chronic medical conditions. There were several other dates in which claimant was absent or late, but was allowed to use flex time under the employer's policy. At the time of the August 22 warning claimant was advised that further occurrences would result in termination. In accordance with the warning claimant was discharged following her September 10 occurrence. (Exhibit 1).

The claimant filed a new claim for unemployment insurance benefits with an effective date of September 9, 2018. The claimant filed for and received a total of $1,092.00 in unemployment insurance benefits for the weeks between September 23 and October 20, 2018. The employer was not able to connect with the IWD representative to participate directly in a fact finding interview regarding the separation on the September 25, 2018, but was able to leave a voicemail containing the pertinent information. The fact finder determined claimant qualified for benefits

REASONING AND CONCLUSIONS OF LAW:

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

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(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 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). 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.

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. 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).

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Here, all of claimant's absences that were attributable to her medical condition were properly reported and are excused. Claimant's occurrence on April 9 is also excused, as she was the sole care provider for an ill minor child. The June 29 occurrence is excused, as it was attributable to an issue the internet service provider was experiencing and was beyond claimant's control. The September 7 is excused, as claimant's interpretation of her new schedule beginning with an A week was reasonable given the content of the email she was sent. This leaves only two unexcused absences. One on May 18 and the final absence on September 10, 2018. Because all but two of her absences were related to properly reported illness or other reasonable grounds, the employer has not established claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility and no misconduct has been shown. Accordingly, benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The September 26, 2018, (reference 01) unemployment insurance decision is affirmed. 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. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs