IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LOUTWAN S HUTCHINS Claimant **CARGILL KITCHEN SOLUTIONS INC** Employer	**APPEAL 20A-UI-04528-BH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/12/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – DM – Excessive unexcused absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview
Federal Coronavirus Aid, Relief, and Economic Security Act (CARES Act), PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

On May 23, 2020, Loutwan Hutchins filed an appeal from the May 15, 2020 (reference 01) unemployment insurance decision that denied benefits based on a finding of excessive, unexcused absenteeism and tardiness. The parties were properly notified about the hearing. A telephone hearing was held on June 9, 2020. Hutchings participated personally. Cargill Kitchen Solutions, Inc. (Cargill) did not register for or participate in the hearing.

ISSUE:

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

Is Hutchins eligible to receive Federal Pandemic Unemployment Compensation (FPUC) under the CARES Act?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds the following facts.

Hutchins started work for Cargill on August 17, 2017. He worked full time as a production specialist. Cargill discharged Hutchins on or about April 10, 2020.

Hutchins is married with children. His family has experienced multiple health issues. Consequently, Hutchins has had to exercise his legal right to take leave under the federal Family and Medical Leave Act (FMLA).

Cargill has an attendance policy. Under the attendance policy, Cargill treats instances of employee absences and tardiness the same. Cargill issues a written reprimand when an employee reaches six absences or instances of tardiness. The company discharges the employee after eight absences or instances of tardiness.

Hutchins's wife was sick. She was receiving care at the Mayo Clinic in Rochester, Minnesota. At the time of hearing, doctors had not yet diagnosed her illness.

Hutchins sought and received approval to use intermittent leave under the FMLA due to his wife's illness and care. The drive between Mason City and Rochester is 90 to 100 miles. Hutchins would drive to Rochester after work to be with his ailing wife. Then he would drive from Rochester to work the next morning. On occasion, he would be tardy for work in the morning because of the commute of 90 to 100 miles.

The evidence in the record is insufficient from which to conclude the policy includes procedural requirements regarding the steps an employee must take when exercising the employee's right to take leave under the FMLA. Sometimes when Hutchinson was late to work because he was visiting his wife at the Mayo Clinic in Rochester, he would ask that the amount of time he was late be categorized as FMLA leave. His supervisor and the third-party entity that administers FMLA leave for Cargill allowed him to do this without reporting his tardiness or disciplining him for it.

However, in or around March, Hutchins's immediate supervisor went on leave. On April 7 and 8, 2020, his team lead was also absent. This made the superintendent Hutchins's immediate supervisor.

On both April 7 and 8, Hutchins was late to work because of the drive from Rochester. These were Hutchins's fifth and sixth instances of tardiness. Each of these instances of tardiness was caused by family health issues.

The superintendent called Hutchins into the office on Friday, April 10, 2020. She informed Hutchins that he was going to be fired for his most recent two instances of tardiness. Hutchins informed her that they were because of his wife's medical care at Mayo Clinic in Rochester. She told Hutchins to report it to the third-party entity that administers Cargill's FMLA leave. Hutchins told her he had done so.

Cargill discharged Hutchins for excessive absenteeism/tardiness on Monday, April 13, 2020. The superintendent told him he had to contact the plant before the tardiness to exercise his right to FMLA leave without disciplinary action. According to the superintendent, he did not comply with company procedures. This was the first Hutchins had heard of this requirement. The superintendent's description of Cargill's policy was not how Hutchins's immediate supervisor had dealt with prior requests he had made for FMLA leave.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Iowa Code section 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 disqualification shall continue 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:

> 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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(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.

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.

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. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id*.; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Excessive absenteeism has been found when there have 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.*, 364 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).

All of Hutchins's absences and instances of tardiness were related to family health issues. They are therefore excused absences under the law. Cargill failed to prove any of the absences or instances of tardiness before April 7 and 8 were unexcused.

Moreover, the incidents of tardiness on April 7 and 8 were excused under the facts of this claim. Hutchins was commuting from work to be with his wife, who was treating at the Mayo Clinic, at night and driving back to Mason City in the day. Absences and tardiness caused by attempting to spend as much time as possible with one's spouse, who is suffering from an undiagnosed serious health condition, are excused under the Iowa Employment Security Law. Moreover, in the current case, Hutchins had sought and received approval to get minutes of tardiness counted toward his FMLA leave previously without disciplinary action by Cargill.

The facts surrounding Hutchins's discharge require reversal of the unemployment insurance decision. Cargill did not discharge Hutchins for a disqualifying reason under Iowa law. Hutchins is entitled to regular unemployment insurance benefits under state law, provided he is otherwise eligible.

Section 2104 of the federal CARES Act provides, in pertinent part:

> (b) Provisions of Agreement
>
> (1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled

> under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to
>
> (A) the amount determined under the State law (before the application of this paragraph), plus
>
> (B) an additional amount of $600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

Because Hutchings is entitled to regular unemployment insurance benefits under state law, he is also eligible to receive Federal Pandemic Unemployment Compensation (FPUC) under the CARES Act.

DECISION:

The agency representative's unemployment insurance decision of May 15, 2020 (reference 01) is reversed because Cargill did not discharge Hutchins for a disqualifying reason. Hutchins is entitled to regular unemployment insurance benefits under state law, provided he is otherwise eligible.

Hutchins is also eligible to receive FPUC under the CARES Act.

Ben Humphrey
Administrative Law Judge

June 24, 2020
Decision Dated and Mailed

bh/scn