IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NATALEAH R MORGAN Claimant **DOLGENCORP LLC** Employer	**APPEAL 15A-UI-10468-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/23/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 11, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 1, 2015. Claimant participated. Employer participated through assistant store manager, Kim Selix. Employer Exhibits One through Four were admitted into the record with no objection. Employer Exhibits Five and Six were admitted into the record over claimant's objection. Claimant objected because the employer never gave claimant the chance to review and/or sign the documents. Employer Exhibit Seven was admitted into the record with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an assistant manager from September 2014, and was separated from employment on August 25, 2015, when she was discharged.

The employer has an attendance policy which requires an employee to call the manager on duty one hour before their scheduled shift if they are going to be late or miss their scheduled shift. Claimant was aware of the employer's policy. Employer Exhibit Seven. The employer gives a warning for every absence, including tardies. The employer follows a progressive discipline that starts with a verbal warning, then a written warning, next a final written warning, and finally termination.

The final incident occurred when claimant was absent for her shift on August 23, 2015. Claimant was absent because she has a part-time job where she works from Saturday night until 3:00 a.m. on Sunday morning. The employer had scheduled claimant to start work at 6:00 a.m. on August 23, 2015. Claimant informed the employer and took herself off the schedule for August 23, 2015 as soon as the schedule was released. As an assistant manager, claimant had the authority to excuse employees from working their scheduled shift. Claimant let

Ms. Selix know a couple days prior to August 23, 2015 that she would not be working that day and again an hour before her shift was to begin on August 23, 2015.

Claimant was last warned on July 23, 2015, for attendance issues. Claimant received two warnings, a verbal warning and a written warning, on July 23, 2015. The verbal warning was from a no-call/no-show on July 4, 2015. Employer Exhibit Two. The written warning was for being three and one-half hours late to work on July 23, 2015. Employer Exhibit Three.

Claimant also received a final written warning for being thirty minutes late for her shift. This incident occurred on August 19, 2015. The employer informed claimant about the final written warning when she was discharged. Other employees had attendance issues, but did not receive any discipline.

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. Benefits are allowed.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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(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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

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. 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.

The employer's argument that claimant had excessive absenteeism is not persuasive. Claimant was discharged for failing to work on August 23, 2015. The employer scheduled claimant to work the 6:00 a.m. to 2:00 p.m. shift. Employer Exhibit Six. Claimant informed the employer on multiple occasions that she was not going to be able to work on August 23, 2015, because of her part-time job. It is noted that claimant's part-time job does not excuse her from working her assigned shifts for the employer. Claimant and Ms. Selix had the authority to run the store and approve time off for employees. Claimant took her name off the schedule for August 23, 2015 and informed Ms. Selix that she could not work that shift. The employer had multiple days to arrange a replacement if one was needed. Furthermore, according to the employer's attendance policy, employees are to receive three warnings prior to discharge. When claimant was discharged she had only received two warnings (both received on July 23, 2015). The

employer had not given claimant the warning for being tardy on August 19, 2015, a tardy that claimant disputes. Employer Exhibit Five. Therefore, on August 23, 2015, claimant was not aware her job was in jeopardy for attendance issues.

Inasmuch as employer had not previously warned claimant her job was in jeopardy pursuant to their progressive disciplinary policy, the employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warnings. 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. Benefits are allowed.

Claimant's two prior absences (July 4, 2015 and July 23, 2015), also does not meet the excessiveness standard. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Benefits are allowed.

Furthermore, other employees had attendance issues while claimant was working for the employer and they were not disciplined. The employer did not apply its attendance and disciplinary policies the same for all employees. Even though the claimant may have been absent without permission on August 23, 2015 and had other absences, since her consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The September 11, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she 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

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