IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CAITLYN L STOKES Claimant **IA DEPT OF HUMAN SVCS/GLENWOOD** Employer	**APPEAL 19A-UI-01207-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/13/19** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 6, 2019, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on February 26, 2019. Claimant participated and testified. Employer participated through Hearing Representative Donna Henry and witnesses Natalie McEwen and Karen Baggett. Kelly Robertson was also present on behalf of the employer, but did not testify. Employer's Exhibits 1 through 12 were received into evidence.

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 began working for employer on August 15, 2011. Claimant last worked as a full-time resident treatment worker. Claimant was separated from employment on January 17, 2019, when she was discharged.

The employer has an attendance policy in place which allows employees up to ten attendance occurrences within a rolling 12-month period. (Exhibit 4). If an employee is absent consecutive days, the absence only counts as one occurrence. The first five occurrences are not subject to disciplinary action, but progressive discipline begins at six occurrences and ends at ten with termination. Employees are also given 40 hours of Care and Necessary Attention (CNA) time to use each year to use towards medical appointments are care involving certain family members, including children. However, in order for CNA time not to count towards occurrences, the employer needs to be notified of the absence the day before. Tardies are accumulated on a separate disciplinary track than absences. Claimant received a copy of and understood this policy. (Exhibit 2).

In December 2018 claimant began to have issues with her attendance. (Exhibit 10). She missed work on December 18 and 22, 2018 and January 1 and 16, 2019 due to her own illness. The employer's notes indicate, on January 1, claimant called from the parking lot to report she was ill and would not be in. (Exhibit 11). On December 31, 2018 claimant missed work because she overslept after taking migraine medication. Claimant testified she submitted this absence for FMLA covered, as she was approved to take intermittent leave for migraines, but that coverage was denied by the employer's third-party administrator. Claimant was absent December 21, 2018 because her minor child was ill. Prior to her absences in December claimant missed work on February 20 when she was involved in a car accident, on March 12 when she was sick, and on October 15 when her child was sick.

The final absence, which led to the decision to discharge claimant from employment, occurred on January 8, 2019. Claimant had to leave early to pick up her minor child, who was sick and had a fever, on January 7, 2019 and missed work the next day to stay home with that same child, as she was required to be fever free for 24 hours before she could return to childcare. The employer testified there was no record of claimant calling in to report her absence on January 8, 2019. Claimant testified she told her supervisor, before she left for the day on January 7, that she would need to stay home with her child the next day too, due to the childcare rules regarding fevers. Claimant believed, since she was giving notice of the absence the day before it would not count as an occurrence. McEwen testified claimant's supervisor had no recollection of claimant telling her that she would be absent on January 8 and that she believed claimant had notified her via phone call from the parking lot that she was going home for the day. Though the decision was made to discharge claimant after her January 7, 2019 absence, she also missed work without a record of calling in on January 13, 2019.

On January 17, 2019, a meeting was held with claimant to discuss her attendance. During this meeting claimant was issued three disciplinary actions for her attendance, including the final disciplinary action terminating her employment. (Exhibits 7 through 9). Both claimant and Baggett testified claimant indicated during this meeting that she felt her December 31, 2018 absence should have been covered under FMLA and that she had told her supervisor she would not be in on January 8, 2019. Prior to this, claimant was issued a separate disciplinary action related to tardies on September 14, 2018. (Exhibit 6). Claimant also believes she had a discussion with her supervisor regarding her attendance in December 2018, but no documentation of that conversation was provided.

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.
>
> 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.

There is a dispute between the parties as to whether the final absence leading to the decision to terminate was properly reported. 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. The claimant was the only witness with direct-firsthand knowledge of the January 7 conversation between herself and her supervisor. Claimant's testimony at the hearing was consistent with what she told the employer during her termination. Furthermore, claimant's supervisor's recollection of events is brought into question based on the fact that she told McEwen claimant called from the parking lot on January 7, but the employer's notes show that call actually occurred on January 1.

Claimant was absent on January 8 because she needed to care for a minor child who could not go to childcare because of a fever. Claimant was reasonable in believing this absence would not be counted against her occurrences based on the employer's policy regarding CNA time. Even looking beyond the final absence, only two of claimant's absences, December 31, 2018 and January 13, 2019, would not be considered excused for purposes of unemployment insurance benefits. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because her last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined.

Additionally, 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Claimant was issued three warnings at the time of her termination. As claimant was separated on the same date as she was given her last two warnings prior to termination, no incidents occurred after those warnings were issued. As such, the employer has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. Benefits are allowed.

DECISION:

The February 6, 2019, (reference 01) unemployment insurance decision is reversed. 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.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/rvs