

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SARAH WOHLT
Claimant

FBG SERVICE CORPORATION
Employer

APPEAL 22A-UI-03684-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/10/21
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Sarah Wohlt, filed an appeal from the January 18, 2022, (reference 01) unemployment insurance decision that denied benefits effective December 28, 2021 based upon the conclusion she was discharged for excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on March 10, 2022. The claimant participated. The employer, FBG Service Corporation, participated through Human Resources Manager Hope Trujillo. The employer was represented by Kathleen Travers.

ISSUE:

Was the claimant separated from disqualifying conduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a cleaning specialist from October 21, 2021, until this employment ended on December 29, 2021, when she was discharged.

The claimant worked a set schedule from 3:00 p.m. to 11:30 p.m. Monday through Friday, when the schools were open. On Wednesdays, the claimant would come in early to clean from 1:30 p.m. to 2:00 p.m. Classrooms could not be cleaned until the children left for the day. The claimant was allowed to flex her time, if she finished the cleaning assigned for that day.

The employer has an employee handbook. The employee handbook contains an absenteeism policy outlining the means for notifying the employer of an anticipated absence and the levels of discipline imposed at each stage. Ms. Trujillo testified she was not aware of the absenteeism policies provisions regarding these two points. The claimant did not receive an employee handbook. The claimant was not scheduled for orientation.

On December 29, 2021, the claimant was terminated for excessive absenteeism.

In January 2022, the claimant received a paycheck for corrections to punches she made on various days.

The claimant did not receive any discipline for allegedly violating the employer's attendance policy prior to being terminated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer has not met its burden to show the claimant was terminated for disqualifying 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(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.

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. 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 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 claimant's testimony more credible than the employer's credibility.

Both parties had credibility issues in this hearing. Both parties testified that they had records in their possession regarding when the claimant punched in and out on various days. Neither party provided these written records in anticipation of the hearing, so that the trier of fact could have access to that information. Neither party gave a convincing rationale for why those records had not been provided.

Specifically, the administrative law judge finds the claimant's testimony credible that she was able to flex her schedule as needed, so long as she completed her work for the day. He also finds credible her allegation that various corrections had to be made to her punches in January 2022, which suggests that the times the employer gave were inaccurate.

The claimant explained that she did not know those records *needed* to be provided or accessible during the hearing. The administrative law judge wants to clarify that there is no requirement for documents to be provided. It is just that when a decision states a claimant has been terminated for absenteeism, it seems to be common sense to him that documents showing when and why she punched in on various days would be helpful for determining if she was absent. Presumably the claimant has known broadly this was the issue with her unemployment since the middle of January 2022, when she received the decision. She could have taken steps to make sure that these documents were accessible during that time frame.

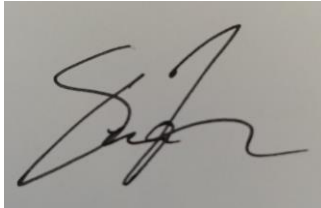
The employer also did not provide these payroll documents. It did not provide a copy of the attendance policy. Human Resources Manager Hope Trujillo was unable describe even in broad strokes what the attendance policy said. Indeed, Ms. Trujillo was not even confident which days of the week the claimant was ordinarily scheduled to work. Ms. Trujillo testified the claimant began work on a Saturday late as proof of absenteeism but she did not know the claimant was not ordinarily scheduled to work on Saturdays and did not know when she was to report on that day. She was also unable to say whether the attendance policy specified when notice of an anticipated absence or tardy was supposed to be given by an employee.

In response to the claimant's general allegation that she was allowed to flex her time around her scheduled shift, so long as she completed the work, Ms. Trujillo gave hearsay testimony that the school has set hours. Ms. Trujillo told the administrative law judge she was told this information by Operations Supervisor Julio Jimenez. The employer did not give a rationale for why Mr. Jimenez was not testifying. In any event, the administrative law judge does not find this hearsay testimony sufficient to undermine the claimant's allegation based on first-hand testimony. Especially, given that the claimant gave specific punch in times before on various dates and the employer made no corrections in rebuttal or otherwise.

Given the claimant has credibly testified that she was able to flex her hours, the employer has failed to meet its burden that she was discharged for excessive absenteeism. Iowa Admin. Code r. 871-24.32(7) requires the employer show by its testimony and exhibits that the claimant's behavior demonstrated an intentional disregard for its policies regarding absenteeism. It has failed to do so. This is especially the case given that the parties agree the claimant never received a warning for her attendance. Benefits are granted.

DECISION:

The January 18, 2022, (reference 01) unemployment insurance decision is reversed. Benefits are granted, provided she is otherwise eligible.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

March 30, 2022
Decision Dated and Mailed

smn/mh