

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROMALDA NAVARRO
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL 19A-UI-06310-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/07/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On August 12, 2019, the claimant filed an appeal from the August 1, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 6, 2019. Claimant participated personally and through witness Martha Castro. Employer participated through human resources supervisor Monica Dyar. Rosio Diaz observed. Employer's Exhibits 1 through 5 were received.

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 May 18, 2009. Claimant last worked as a full-time boxer. Claimant was separated from employment on July 10, 2019, when she was discharged.

Employer has a no-fault attendance policy stating that an employee will be terminated after accumulating eight attendance points. Per the policy, an employee is assigned three attendance points for a no-call/no-show absence. A no-call/no-show absence is defined as an absence that is reported more than two hours after the start of the shift. An employee is assigned one point for a properly reported absence. An employee is assigned a half-point for a tardy. Claimant was aware of the policy.

On September 18, 2018, claimant was absent due to illness. The absence was properly reported. Claimant was assigned one point.

On January 12, 2019, claimant was absent for a personal reason. The absence was properly reported. Claimant was assigned one point.

One March 10, 2019, claimant had a no-call/no-show absence. Claimant was assigned three points for the absence.

On March 26, 2019, claimant was given a warning for attendance.

On June 26, 2019, claimant had a no-call/no-show absence. Claimant was scheduled to work at 6:55 a.m. Claimant was absent. Claimant called in at noon to ask if she had vacation or she was scheduled to work. Claimant was informed she was scheduled to work. Claimant stated she would not be able to come in. Claimant was given three points for the absence.

On July 10, 2019, employer terminated claimant's employment for violating the attendance policy.

Martha Castro previously worked for employer. Castro was a part-time employee and accrued more than eight attendance points due to absences for illness. Employer does not apply the attendance policy strictly to part-time employees. Employer did not terminate Castro. Employer gave Castro the opportunity to obtain doctor's excuses for the absences, but instead Castro resigned.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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. 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). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive.

Claimant asserts she should not be disqualified as employer did not enforce the attendance policy with her former co-worker, Martha Castro. However, Castro was not in the same situation as claimant. Castro was a part-time employee and exceeded her attendance points due to illness, not because of no-call/no-show absences. Employer did not apply the policy disparately as claimant and Castro were not similarly situated employees.

DECISION:

The August 1, 2019, (reference 01) decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Christine A. Louis
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Decision Dated and Mailed

cal/scn