

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KAMBER R FREESE
Claimant

MCGRATH MOTORCYCLES OF DUBUQUE
Employer

APPEAL 17A-UI-07845-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/04/17
Claimant: Appellant (2)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kamber R. Freese (claimant) filed an appeal from the July 10, 2017, reference 01, unemployment insurance decision that denied benefits based upon the determination McGrath Motorcycles of Dubuque (employer) discharged her for repeated tardiness after being warned. The parties were properly notified about the hearing. A telephone hearing was held on August 24, 2017. The claimant participated. The employer did not respond to the hearing notice and did not participate. Department's Exhibits D1 and D2 were received.

ISSUES:

Is the appeal timely?

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: The claimant was employed part-time as a Motor Clothes Assistant beginning on February 25, 2013 and was separated from employment on May 22, 2017, when she was discharged.

The claimant was scheduled to come to work at 10:00 a.m. on May 19, 2017. She notified her Assistant Manager via text message that morning that she would not be able to be to work until 12:00 p.m. because she needed to speak with an instructor at school. The Assistant Manager approved the claimant's absence from work. The claimant was then discharged for her absence. The claimant had no other absences and had not received any warnings related to absenteeism.

The claimant participated in the fact-finding for her separation on July 7, 2017. She was told it could be a week before she would receive the fact-finder's decision. An unemployment insurance decision was mailed to the appellant's address of record on July 10, 2017, it contained a warning that an appeal needed to be filed by July 20, 2017. She received the decision within ten days of the mailing. On July 17, 2017, the claimant had another fact-finding

interview. The fact-finder told her to expect the unemployment insurance benefits to be deposited into her account within a couple of weeks. The claimant believed she no longer needed to appeal the first decision as an Iowa Workforce Development (IWD) representative told her that she would be receiving her benefits. On July 31, 2017, the claimant had not received benefits and contacted IWD. She was told at that time to file the appeal to the initial decision. She filed her appeal on August 1, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is timely and she was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The claimant's failure to file an appeal within the appeal period was solely because of misleading information received from an IWD representative. This delay was prompted by and perpetuated by the agency. See, Iowa Admin. Code r. 871-24.35(2). Once she learned of the misinformation, she filed her appeal within ten days. Therefore, the appeal shall be accepted as timely.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

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 the 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); 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 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*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Absences must be both excessive and unexcused to result in a finding of misconduct. The claimant notified her employer she would be late and received approval from the assistant manager to be late. The unrefuted testimony is that the claimant was discharged for one absence and did not have any prior warnings. One absence is not considered excessive. The employer has not established that the claimant had excessive, unexcused absences which would disqualify her from receiving benefits. Accordingly, benefits are allowed.

DECISION:

The claimant's appeal was timely. The July 10, 2017, 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. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn