

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRICIA L OSGOOD
Claimant

APPEAL 18A-UI-11924-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PARCO LTD
Employer

**OC: 11/11/18
Claimant: Appellant (1)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Code § 96.5(11) – Incarceration
Iowa Admin r. 871-24.32(7) – DM – Excessive unexcused absenteeism
Iowa Admin r. 871-24.26(17) – VQ – Incarceration

STATEMENT OF THE CASE:

Tricia Osgood, Claimant, filed an appeal from the December 4, 2018 (reference 01) unemployment insurance decision that denied benefits because she voluntarily quit work with Parco LTD by failing to report to work for three days in a row and not notifying her employer. The parties were properly notified of the hearing. A telephone hearing was held on December 28, 2018 at 9:00 a.m. Claimant participated. Employer participated through Jessica Walsh, Director of Human Resources. No exhibits were admitted.

ISSUES:

Whether claimant's separation was a voluntary quit without good cause attributable to the employer.

Whether claimant's separation is disqualifying due to incarceration.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a manager from December 27, 2017 until her employment with Parco LTD ended on September 16, 2018. (Claimant Testimony; Walsh Testimony)

Approximately two years ago, claimant was found guilty of violating a no-contact order and was sentenced to serve 14 days in jail. (Claimant Testimony) Claimant did not serve the jail sentence immediately; instead, claimant was granted an extension to serve the sentence based upon her employment. (Claimant Testimony) When the extension expired, a warrant was issued for claimant's arrest. (Claimant Testimony)

On September 12, 2018, claimant was arrested. (Claimant Testimony; Walsh Testimony) Claimant had her roommate and coworker notify employer that she would be absent from work.

(Claimant Testimony) Employer knew that claimant's sentence was 14 days. (Claimant Testimony) Claimant was scheduled to work 10 days every two weeks; thus, claimant would have been scheduled to work 10 days during her incarceration. (Walsh Testimony) Claimant was released from jail on September 26, 2018. (Claimant Testimony) On September 27, 2018, claimant contacted employer and was informed that her employment had ended. (Claimant Testimony) Employer considered claimant to have voluntarily quit her job due to her absences on September 14 – 16, 2018. (Walsh Testimony)

Employer has an attendance policy which provides that an employee who fails to appear for work for three shifts without notice to employer is considered to have voluntarily quit her job. (Walsh Testimony) The policy is located in the employee handbook. (Walsh Testimony) Claimant received a copy of the handbook. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit her employment without good cause attributable to the employer. Benefits are denied.

Iowa Code section 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 disqualification shall continue 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 Code section 96.5(11) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

11. *Incarceration –disqualified.*

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue 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 r. 871-24.26(17) provides:

Separation due to incarceration.

a. The claimant shall be eligible for benefits if the department finds that all of the following conditions have been met:

- (1) The employer was notified by the claimant prior to the absence;
- (2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the claimant was found not guilty of all criminal charges relating to the incarceration;
- (3) The claimant reported back to the employer within two work days of the release from incarceration and offered services to the employer; and
- (4) The employer rejected the offer of services.

b. If the claimant fails to satisfy the requirements of subparagraph 24.26(17)"a"(1), the claimant shall be considered to have voluntarily quit the employment if the claimant was absent for three work days or more under subrule 24.25(4). If the absence was two days or less, the separation shall be considered a discharge under rule 871-24.32(96). If all of the conditions of subparagraphs 24.26(17)"a"(2), (3) and (4) are not satisfied, the separation should be considered a discharge under rule 871-24.32(96).

Iowa Admin. Code r. 871-24.32(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *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 r. 871-24.32(7) provides:

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192; *Infante*, 364 N.W.2d at 262; *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Claimant's separation from employment was due to her incarceration. While claimant notified employer of her absence before her incarceration and reported back to employer within two days of her release from incarceration, claimant was incarcerated because she pled or was found guilty of a crime. Therefore, claimant did not meet the criteria listed in Iowa Code section 96.5(11)(a)(2) and is therefore disqualified for benefits. A claimant must meet all the criteria listed in Iowa Code section 96.5(11) in order to be eligible for benefits.

In the alternative, claimant's separation from employment can be viewed as a discharge for excessive absenteeism. Claimant's absences on September 14th, 15th and 16th are unexcused. While claimant notified employer of her absences, the reason for the absence was claimant's incarceration, which is not considered a reasonable grounds. Claimant provided employer with one day notice of a 14 day absence. If claimant had scheduled to serve her 14 day sentence instead of being arrested, she could have requested time off from work without jeopardizing her employment. Three unexcused absences in less than 9 months of employment are excessive. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The December 4, 2018 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs