

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DYLAN J MCLAUGHLIN
Claimant

ABCM CORPORATION
Employer

APPEAL 22A-UI-07187-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/06/22
Claimant: Appellant (2)

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quitting
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules
Iowa Admin. Code r. 871-24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Claimant/appellant, Dylan McLaughlin, filed an appeal from the March 21, 2022, (reference 01) unemployment insurance decision that denied benefits, finding the discharge from work on 02/25/21, was for excessive unexcused absenteeism. After proper notice, a telephone hearing was conducted on May 5, 2022. Claimant personally participated personally. Employer, ABCM Corporation, participated through Randi Derifield, human resources coordinator and party representative, and Ann Litterer, assistant director of nursing. Judicial notice was taken of the administrative records. Department's Exhibit D-1 (fact finding documents) was admitted.

ISSUE:

Was the separation a layoff, discharged for misconduct or a voluntary quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed PRN, as a certified nurse's aide (CNA). His first day worked was 04/30/21. His last day worked was 02/22/22. Claimant was separated from employment on 02/28/22 when he was discharged for excessive unexcused absenteeism. Claimant received no disciplinary action for attendance or any other issue and was not aware his job was in jeopardy.

Employer has an employee handbook which claimant was given a copy of or access to an electronic copy at his first day of employment. Claimant acknowledges this. The handbook has a policy called "Employee Absenteeism/Lateness" which requires termination after the 3rd unexcused absence in any 90-day period. See R-1, page 9. A no call / no show is an automatic unexcused absence and any 3 NC/NS in a rolling 12-month period results in termination. See R-1, page 9. Regarding lateness, at the 7th occasion of lateness in a rolling 90-day period results in termination. See R-1, page 9.

Claimant was sent a certified letter, dated March 1, 2022, stating that claimant was discharged effective 02/28/22, due to exceeding “more than tree absences in the past 90 days, because of the severe impact of absences without appropriate notice, these are tracked on a twelve-month look back period.” See R-1, page 7. Claimant refuses to accept the letter

Employer testified as to the below incidents being factored into claimant’s discharge, with date being date of event; the event being either an absence, late, leave early or no call/no show (NCNS); the reason is reason claimant offered for event: replace addresses whether claimant provided someone to replace him and cover his shift; and excused is whether the employer excused the event:

c	EVENT	REASON	REPLACE	EXCUSED
02/28/22	NC/NS	nc/ns - therefore no reason provide	No	NO
02/25/22	Absent	Chest Pains - timely reported	No	No (R)
02/24/22	Absent	Chest Pains - timely reported	No	No (R)
02/23/22	Absent	Chest Pains - timely reported	No	No (R)
02/16/22	Absent	Threw back out - timely reported	No	No (R)
01/28/22	Absent	Migraine - timely reported	No	No (R)
01/21/22	Absent	Wrist Pain - timely reported	No	No (R)
01/17/22	Absent	Head hurt - timely reported	No	No (R)
12/30/21	Left Early	50 min. early w/out getting permission	No	No (no ok & R)
12/22/21	Late	20 min., no reason - not timely reported	No	No (untimely & R)
11/15/21	Absent	Stomachache - not timely reported	No	No (untimely & R)
10/20/21	Absent	Gma in hospice - not timely reported	No	No (untimely & R)
10/13/21	Absent	Family Emergency - not timely reported	No	No (untimely & R)
09/14/21	Absent	Migraine - timely reported	No	No (R)
09/01/21	Absent	Mom in Hospital - not timely reported	No	No (untimely & R)
08/29/21	Absent	Family Issue w/Mom - timely reported	No	No (R)
08/04/21	Late	30 min., no reason - not timely reported	No	No (untimely & R)
07/06/21	Absent	Stomach bug - not timely reported	No	No (untimely & R)
06/11/21	Absent	Ulcer pain - timely reported	No	No (R)

Employer noted that there were other absences that were not discussed, as they wither fell into excused absences or were outside the policy window and not factored.

Given the employer’s policy window of 90 days for any non-NC/NS incidents, and the date of separation being 02/28/22, the 90-day look back period takes us to incidents that happened on or after 11/30/21. Claimant was not on a leave of absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying misconduct.

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 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.

871 IAC 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.

Iowa Admin. Code r. 871-24.1 provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

24.1(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

To the extent that the circumstances surrounding each incident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

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. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer has failed to prove they had previously warned claimant about any issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (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. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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 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. 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*. See, *Gimbel v. Emp’t Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant’s late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep’t of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer admits that claimant was never warned about his absences nor that further absences could result in termination of employment.

Per the employer’s own policy, they have a 90-day look back period for all non-NC/NS incidents, which make such incident before 11/30/21, outside of the scope of the employer’s policy and the nine events are removed from consideration.

Absences must be unexcused. For purposes of unemployment benefits, personal illness of claimant that is timely reported is considered an excused absence. Not having a replacement lined up to take over one’s shift may not follow the employer’s policy but is not a requirement for unemployment benefits regarding absences. As such, the incidents of 02/25/22, 02/24/22, 02/23/22, 02/16/22, 01/28/22, 01/21/22, and 01/17/22, cannot be factored and are removed.

This results in just three incidents in violation of employer’s policy to factor in with unemployment benefit requirements and makes the chart now look like this:

DATE	EVENT	REASON	REPLACE	EXCUSED
02/28/22	NC/NS	nc/ns - therefore no reason provide	No	NO
12/30/21	Left Early	50 min. early w/out getting permission	No	No (no ok & R)
12/22/21	Late	20 min., no reason - not timely reported	No	No (untimely & R)

Employer has failed to meet their burden in proving misconduct (excessive unexcused absences) to warrant employer discharging claimant. Claimant was never warned, nor knew his job was in jeopardy. While employer may have had good reasons to let claimant go, there was no disqualify reason proven and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The March 21, 2022, (reference 01) decision is **REVERSED**. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Darrin T. Hamilton
Administrative Law Judge

May 26, 2022

Decision Dated and Mailed

dh/ac