

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMY L BRANNAN
Claimant

BLACKHAWK LIFECARE CENTER INC
Employer

APPEAL 19A-UI-07002-CL

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/28/19
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On August 30, 2019, the claimant filed an appeal from the August 21, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A hearing was held in Carroll, Iowa, on October 11, 2019. Claimant participated personally and was represented by mental health and disabilities service coordinator Leisa Mayer, who also testified. Jean Boekman and Carlene Brincks also testified on claimant's behalf. Employer participated through administrator Jessica List and business office manager and administrative assistant Lisa Pudenz. Employer's Exhibits 1 through 4 were received. Claimant's Exhibit A was 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 September 30, 2009. Claimant last worked as a full-time certified nurse's aide (CNA). Claimant was separated from employment on August 2, 2019, when she was terminated.

Claimant was diagnosed with bipolar disorder in high school. Claimant also has a learning disability. Claimant's learning disability affects her judgment and independent decision making skills. A home health nurse and social worker provide claimant services to assist her with daily living. Claimant does not have a guardian and is legally considered to be an independent adult. Claimant is hearing impaired in both ears. Claimant wore hearing aids in both ears up until recently, when she received a cochlear implant in one ear.

Claimant has worked for employer for a number of years and has taken Family and Medical Leave Act (FMLA) leave in the past. Previously, an administrator or other employee assisted claimant in completing her FMLA paperwork. Claimant has never completed the paperwork without assistance.

On April 22, 2019, Jessica List became administrator. Being new to the job, List did not have complete information regarding the challenges claimant faces due to her medical conditions.

On June 20, 2019, claimant was experiencing a manic episode. Claimant informed employer that she needed time off due to a medical condition. Employer gave claimant FMLA paperwork to complete, but did not assist her in completing it. Claimant did not complete the paperwork.

Claimant's attendance thereafter was sporadic. Claimant was in a crisis shelter from July 1 through 3, 2019. Claimant's employer was aware of this.

During this time period, employer asked claimant numerous times to complete the FMLA paperwork it had given her. Claimant failed to do so. At one point, employer faxed the documents to claimant's mental health provider. The mental health provider completed its portion of the paperwork, but claimant did not complete her portion.

By July 16, 2019, claimant was back on her medication and in stable condition. Claimant worked that day. Claimant was in a lot of pain due to issues she was having with her gallbladder. Claimant saw a doctor and learned she would need to have surgery. Claimant got a note from the doctor who saw her for her gallbladder.

On July 17, 2019, claimant worked. Claimant brought the doctor's note to employer. Administrator List and the director of nursing met with claimant about her attendance. During the meeting, List perceived that claimant was having difficulty hearing. Claimant's hearing was limited in the same manner it had been during her previous ten years of employment. Claimant's hearing aid had been malfunctioning early, but was not malfunctioning on July 17. Claimant was scheduled to get cochlear implants in the coming months. Claimant either attempted to explain this to List or felt too intimidated to do so. In any case, List felt it would be unsafe for claimant to work on the floor as a CNA with her hearing limitation. List told claimant she would have to work in the dietary or housekeeping department until her hearing issues were resolved. Claimant disagreed with being assigned to the other departments, but could not clearly articulate her reason for disagreement. Employer gave claimant a written warning regarding her attendance and lack of communication regarding her attendance. The warning stated that employer was aware claimant needed upcoming time off and that she needed to complete FMLA paperwork if the time off consisted of more than three days. However, employer did not supply claimant with a copy of the paperwork that needed to be completed. Employer sent claimant home.

Later the same afternoon, claimant sent a text message to List stating, "Can I come back to work when I get my gallbladder done and work in a different department." List responded, "Touch base with me [sic] you have everything figured out."

Claimant did not complete FMLA paperwork requesting leave for her gallbladder surgery.

Claimant had gallbladder surgery on July 25, 2019. After the surgery, the medical provider gave claimant a note stating she was restricted from working for two weeks. Claimant brought the note into employer's facility and spoke with List. Claimant asked to return to work in the dietary or housekeeping department. List told claimant that there were no openings at the moment, but she could complete a job application.

Claimant filed a claim for unemployment insurance benefits on August 2, 2019, with an effective date of July 28, 2019.

Claimant had not yet filed any weekly claims for unemployment insurance benefits at the time of the hearing.

REASONING AND CONCLUSIONS OF LAW:

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

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 due to absenteeism, 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).

In this case, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant's last absences were due to a medical condition. Employer was aware claimant was going to be absent for an extended period of time and was not going to return to work until the issue with her medical condition was resolved. Employer did not instruct claimant to report her absence each day. Employer instructed claimant to get into contact when the issue was resolved. Claimant did so.

To the extent employer asserts the misconduct is claimant's failure to complete FMLA paperwork, that is not considered misconduct. FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because her last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The August 21, 2019, (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.

Christine A. Louis
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Decision Dated and Mailed

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