

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROXANNE C MURPHY

Claimant

**JENNIE EDMUNDSON MEMORIAL
HOSPITAL**

Employer

APPEAL 18A-UI-03753-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/04/18

Claimant: Appellant (1)

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

Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 21, 2018 (reference 01) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on April 17, 2018. The claimant, Roxanne C. Murphy, participated personally. The employer, Jennie Edmundson Memorial Hospital, participated through witnesses Cameron Lind and Joe Poore.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time from September 6, 2016 until March 2, 2018. Claimant was a certified surgical technologist II and her job duties included preparing, cleaning and assisting with surgical procedures. Mr. Poore was claimant's immediate supervisor.

The employer has a written attendance policy and written disciplinary policy. Claimant received a copy of both policies. The disciplinary policy is a progressive policy with disciplinary steps including documented discussion, written warning, suspension and discharge.

Claimant had received previous discipline regarding absenteeism, including a documented discussion on February 2, 2017; a written warning on May 31, 2017; and a suspension on August 23, 2017. Claimant received a documented discussion on February 2, 2017 because she had been tardy to work on three occasions in January of 2017. Claimant was tardy on those three occasions for unknown reasons.

Claimant received a written warning on May 31, 2017 because she had been absent on April 10, 2017 due to car trouble, absent on May 31, 2017 due to illness, and tardy for unknown reasons on five occasions in May of 2017. Claimant had received a suspension on August 23, 2017 because she had been absent on July 31, 2017 and August 1, 2017 due to illness and

been tardy for unknown reasons on nine occasions between June 20, 2017 and August 17, 2017.

The final incident of tardiness leading to claimant's discharge occurred on February 23, 2018, when claimant was tardy to work due to traffic. Claimant did not report her tardiness prior to her scheduled shift start time.

On February 19, 2018, claimant was absent from work because the roads were icy and claimant believed it was unsafe for her to drive to work. On February 5, 6, and 7, 2018 claimant was absent from work due to illness. On January 23, 2018, claimant was tardy to work due to traffic. On December 14, 2017, claimant was tardy to work because she stayed with her ill family member until her significant other could come and stay with him.

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. Benefits are denied.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment for job-related misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 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). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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) (emphasis added); 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 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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). 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." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but

not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

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 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *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).

In this case, the claimant had received a documented discussion, a written warning, and a suspension for absenteeism prior to her discharge. The claimant knew that she needed to come to work on time. She understood the attendance policy and knew that her job was in jeopardy if she continued to be absent or tardy. Claimant had four incidents of unexcused absences or incidents of tardiness in less than a three-month period after she had been disciplined for absenteeism. Those four incidents of unexcused absenteeism occurred on February 23, 2018, February 19, 2018, January 23, 2018 and December 14, 2017. Four incidents of unexcused absenteeism in less than a three-month period after receiving a verbal warning, a written warning and a suspension for the same type of behavior is considered excessive. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on February 23, 2018 was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, amounts to job-related misconduct. Benefits are denied.

DECISION:

The March 21, 2018 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs