

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

DARINCESA L WILLIAMS
Claimant

APPEAL NO. 13A-UI-11713-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LANCE PRIVATE BRANDS LLC
Employer

OC: 12/09/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 11, 2013, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 12, 2013. Claimant participated with Jason Scheeler. Employer participated through human resources generalist, Melissa Stissler (since September 2013).

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 was employed full time as a packer/general help on third shift and was separated from employment on September 3, 2013. She was last absent on August 26 and 27, due to reported "home duties" when her child care provider had a death in the family and was unable to care for her children. The employer counted each day's absence as one point against her on the attendance point system. Her children are ages 9, 8, and 5 and slept at the sitter's home while claimant worked. She had been warned in writing on December 19, November 19, and October 24, 2012, about excessive absenteeism. As of August 27, 2013, the employer calculated 9 points. Eight points or occurrences within a 12-month period will result in termination according to the company policy. She was also absent on September 23, 2012 (partial day related to child care – 1 point); October 22 (partial day related to illness – stomach cramps – 1 point); November 13 (partial day due to an unknown reason – 1 point); and December 18, 2012 (home duties related to the unreliable babysitter – 1 point); June 17 (partial day due to stomach problems – ½ point); and July 29, 2013 (sick – 1 point). She was tardy on October 1 and 2, 2012, and June 13, 2013, which counted a total of 1 ½ points against her. The employer has a no-fault attendance policy that treats all absences the same, regardless of reason. She tried to find an alternate child care provider and attempted to enlist the employer's assistance through former human resources generalist Stephanie, who left Lance on July 12, 2013. Claimant lived in Burlington while working there without family or friends outside of work. Her mother could keep the children in the summer, but not during the school year. Claimant

asked to be moved to first shift in August 2012, and Stephanie put her on a wait list but no opening became available.

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.

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.

871 IAC 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 Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The last absence was due to the child care provider emergency, which is not generally considered an excused absence. However, primary, let alone back up, child care for third shift workers is not readily available, especially in a smaller town. Thus the final absences were for reasonable grounds and are considered excused. Even if they are considered unexcused, the October 22, 2012; June 17, 2013; and July 29, 2013, absences do not count against her because they were related to properly reported illness. Thus the two and one-half points counted against her for those absences, when deducted from the nine point total, result in an unexcused point total of six and one-half, which is below the termination threshold. Benefits are allowed.

DECISION:

The October 11, 2013, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits withheld based upon this separation shall be paid.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css