

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHELLE R VOUGHT
Claimant

MATTHEW J MAGGIO DDS PC
Employer

APPEAL 17A-UI-04891-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/16/17
Claimant: Appellant (2R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 5, 2017, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on May 25, 2017. The claimant participated and testified. The employer participated through owner Matthew Maggio and office manager Janelle Hotz. Claimant's Exhibits A through C were received into evidence.

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 part time as a certified general assistant from August 8, 2001, until this employment ended on April 18, 2017, when she was discharged.

On March 22, 2017, claimant requested the following day off so she could travel to Des Moines to be with her mother, who was having surgery. Claimant's request was granted. During the surgery it was discovered that claimant's mother had terminal cancer and would need to be moved to in-home hospice care right away. Claimant contacted the employer to explain the situation and asked for the following week off. This requested was granted.

On March 27, 2017, claimant spoke to Hotz who asked if she was coming in the next day. Claimant told Hotz she was off the entire week and Hotz reminded her to be sure to keep Maggio informed. Claimant later sent a text message to Maggio explaining that her mother was requiring 24/7 care and asking if she could take time off the care for her. Claimant explained she did not know when she would be back. This request was also granted. Maggio testified at some point in time, he was not sure when, but thought it might have been the first week of April, he left a voicemail for claimant telling her she needed to contact him and let him know what was

going on and when she might be back to work, as they were short-handed. Maggio did not provide claimant with a date she was expected to return to work and indicate that her job was in jeopardy. Claimant denied ever receiving this voicemail.

On April 18, 2017, Maggio sent claimant a letter informing her that, while he understood her situation, her continued absence was causing a hardship for him, and he was discharging her from employment. (Exhibit C). Prior to sending this letter Maggio had not warned claimant of termination or advised her that her job was in jeopardy if she failed to contact him or return to work by a particular date. Claimant testified she had no idea her job was in jeopardy until the time of her termination.

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.

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(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 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). 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*, 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.

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* 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.

Claimant was off work to care for her mother. Claimant requested time off to care for her mother, stating she was not sure when she would be back, and this request was granted. Here, it appears, based on Maggio's termination letter to claimant, that she was discharged, not due to her attendance, but because of the effect her absence, which had previously been approved, was having on the employer. While it may be true that claimant's absence put the employer in a difficult situation, this is not deliberate misconduct.

Even assuming claimant's attendance was the issue, 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. Here, as far as claimant knew, her absence had been approved. She was not warned that her job was in jeopardy or that she risked termination if she did not return to work or contact the employer by a certain date. Inasmuch as employer had not previously warned claimant about the issue leading to the separation or that her job was in jeopardy, 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. Benefits are allowed.

Information was presented during the hearing to indicate that claimant was unavailable for work to care for her ailing mother. The issue of whether claimant was able to and available for work

effective April 16, 2017 has not yet been determined and must be remanded to the benefits bureau for initial investigation and determination.

DECISION:

The May 5, 2017, (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. Benefits withheld based upon this separation shall be paid to claimant.

REMAND:

The issue of whether claimant was able to and available for work effective April 16, 2017 is remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs