

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ROBIN L CAPPS**  
Claimant

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**APPEAL 16A-UI-06605-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/15/16**  
**Claimant: Appellant (1)**

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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 June 6, 2016 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 30, 2016. The claimant, Robin L. Capps, participated. The employer, Harvey's BR Management Company, Inc., participated through Tim Fajkus, Director of Casino Operations; Vicki Broussard, Human Resources; and Kathy Lauritzen of Equifax/Talx represented the employer.

**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 beverage server from February 19, 2014 until this employment ended on April 29, 2016, when she was discharged.

Claimant's final day of work occurred on April 22, 2016. Claimant arrived late that day. She reported to Rhoda, a supervisor, that she was late because her father was in the hospital. Claimant also left early that day because of her father. Claimant received one and one-half attendance points that day, as she arrived late and left early with more than four hours remaining in her shift. Claimant testified that she spoke to Sandy, a supervisor, that day and Sandy told her that she had exceeded the allowed number of attendance points. Claimant was suffering from a migraine due to the stress of her father's hospitalization and other issues, and she believed she had been fired. Claimant suspects she and Sandy had a miscommunication about the reason she was leaving work. Claimant admits Sandy did not tell her she was discharged and instructed her to contact Vicki in HR about her points.

Claimant did not report to work the following day. When the employer called to inquire about her status, claimant reported that she would be absent again that day because of her father. At this point, claimant received her final attendance point. Claimant was discharged via telephone six days later. While claimant was a no-call/no-show for a shift on April 26, Fajkus and Broussard testified that this absence was not factored into the decision to discharge claimant, as she had already “pointed out” under the attendance policy. Following her discharge, claimant spoke to Broussard. She reported that Sandy had told her to talk to HR, and she reported that her final absences were related to her father’s hospitalization.

Claimant was absent on April 21, 2016. She called in with less than two-hours’ notice. Claimant was absent on March 9, 2016, for no reported reason. Claimant was late on January 7, 2016, due to bad roads. She was late on November 29, 2015. She was late on November 17, 2015 and November 11, 2015 because she read the schedule wrong and believed she started later than she actually did. She was late on September 22, 2015 because she was caught in traffic. Claimant received a written warning on November 11, 2015, due to attendance. She received a final written warning on January 7, 2016, due to attendance. She was aware her job was in jeopardy at that time.

### **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 withheld.

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(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.

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. 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* 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.

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 Dep’t of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer’s witnesses provided more credible testimony than claimant. While claimant contends she left work on April 22 due to a migraine, and not due to her father’s hospitalization, she admits there was confusion when communicating with Sandy. Additionally, she gave conflicting statements about whether she told Sandy she was leaving because of a migraine, and she admits that no one told her she was discharged or could not come back to work if she left on April 22. While the employer did not present Sandy to provide sworn testimony or submit to cross-examination, the combination of Fajkus’s and Broussard’s testimony, when compared to claimant’s recollection of the event, establishes the employer’s evidence as credible.

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 evidence in this case shows that claimant’s final absence was likely due to her father’s hospitalization, not her own personal illness or a true emergency. While claimant testified during the hearing that she needed to leave work due to a migraine, she did not report this to her employer. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment and the final absence – even if excused – was not properly reported. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

**DECISION:**

The June 6, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Elizabeth Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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