

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BETH E AMO
Claimant

APPEAL 18A-UI-09573-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXCEPTIONAL PERSONS INC
Employer

**OC: 08/19/18
Claimant: Appellant (1)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin Code r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Beth Amo, Claimant, filed an appeal from the September 11, 2018, (reference 01) unemployment insurance decision that denied benefits because she voluntarily quit work with Exceptional Persons, Inc. by failing to report to work for three days in a row without notifying her employer. The parties were properly notified of the hearing. A telephone hearing was held on October 1, 2018 at 9:00 a.m. Claimant participated. Hattie Holmes, claimant's hearing representative, also participated. Employer participated through Lisa Paterno, Human Resources Director. No exhibits were admitted.

ISSUE:

Whether Claimant's separation was a voluntary quit without good cause attributable to the employer or a discharge due to 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 Direct Support Professional with Exceptional Persons, Inc. from November 8, 2017 until her employment ended on August 14, 2018. (Paterno Testimony) Exceptional Persons, Inc. is a non-profit serving people with intellectual disabilities, brain injuries and severe mental illness. (Paterno Testimony) As a direct support professional, claimant assisted individuals with everyday tasks. (Claimant Testimony) Claimant's direct supervisor was Jodie Schmidt, Program Manager. (Paterno Testimony) Claimant worked Monday, Tuesday, Thursday and Friday and three weekends per month; claimant's hours varied. (Claimant Testimony)

The last day claimant worked was July 22, 2018. (Claimant Testimony) Claimant was scheduled to work July 23, 2018 but did not report for work, because she suffered a heart attack resulting in hospitalization. (Claimant Testimony) Claimant's fiancé notified employer on July 23, 2018 that claimant would not be at work that day. (Paterno Testimony) On July 25, 2018, claimant was provided a physician's statement that she should not return to work until

after she was cleared by her cardiologist and that claimant's next appointment was on August 7, 2018. (Claimant Testimony) Employer received a copy of the physician's statement and approved medical leave for claimant from July 23, 2018 until August 6, 2018. (Paterno Testimony)

On July 26, 2018, employer mailed claimant a leave of absence form to complete and return to employer; employer also requested claimant provide an update after her August 7th appointment regarding when she may return to work. (Paterno Testimony) Claimant received employer's July 26, 2018 letter. (Claimant Testimony) Claimant took the leave form to her doctor's appointment on August 7, 2018, had the doctor complete the form and an updated statement of when claimant could return to work, and had the doctor's office fax the form and doctor's statement to employer. (Claimant Testimony) Employer did not receive the completed leave form or any updates from claimant following her August 7, 2018 doctor's appointment. (Paterno Testimony) On August 8, 2018, employer called claimant and left a voicemail message requesting a return call. (Paterno Testimony)

Employer did not have any communication with claimant from August 7, 2018 until August 14, 2018. (Paterno Testimony; Claimant Testimony) On August 14, 2018, employer sent claimant a letter stating claimant was discharged effective August 6, 2018 for failure to appear for work for three days without notice to the employer. (Paterno Testimony) After claimant received termination letter, she provided a copy of the doctor's undated statement that claimant could return to work on August 20, 2018 without any restrictions. (Paterno Testimony)

Employer has a policy that failure to report to work for three days without notice is deemed job abandonment and a voluntarily resignation. (Paterno Testimony) Employer also has policy regarding notice; if an employee will be absent, she must call her supervisor before the start of her shift. (Paterno Testimony) These policies are included in the employee handbook. (Paterno Testimony) Claimant received a copy of the handbook. (Claimant Testimony) Claimant had prior warnings regarding attendance, tardiness, leaving work before the end of her shift without permission and proper notice of absences/tardies. (Paterno Testimony)

On March 8, 2018, claimant left her shift three hours early, which led to a verbal warning by her supervisor. (Paterno Testimony) On March 23, 2018, claimant called in and left a voicemail message that she would not be at work that day. (Paterno Testimony) Claimant did not speak to her supervisor or the supervisor on call as required by policy. (Paterno Testimony) This resulted in another verbal warning. (Paterno Testimony) On April 12, 2018, claimant was half an hour late to work because she overslept. (Paterno Testimony) On May 18, 2018, claimant was over two hours late because she overslept. (Paterno Testimony) Claimant was scheduled to work August 7, 2018, August 9, 2018 and August 10, 2018. (Claimant Testimony) Claimant received her work schedule for the month of August on July 15, 2018. (Claimant Testimony) Claimant did not report to work August 7, 2018, August 9, 2018 or August 10, 2018 and did not notify employer of her absence. (Paterno Testimony) Claimant did not intend to leave her employment with Exceptional Persons, Inc. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit her employment; claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

Iowa Code section 96.5(1)(d) provides that an individual is disqualified for benefits, if the individual left work voluntarily without good cause attributable to the employer. A voluntary

quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer. Iowa Code § 96.6(2).

Claimant had no intention of terminating her employment relationship with employer. Claimant was absent from work due to a non-work-related injury, obtained the advice of a physician, notified her employer of her absence and attempted to provide updates to her employer regarding her recovery and when she would be able to return to work. This shows claimant's intention to continue her employment relationship with employer. Therefore, claimant's separation was not a voluntary quit; it was a discharge for misconduct.

Iowa Code section 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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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.

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.

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). Employee misconduct must be a current act in order to deny unemployment benefits. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985).

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191.

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*, 321 N.W.2d at 262; *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 Ct. App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58.

While some of claimant's absences were for reasonable grounds, none of them were properly reported. The last three absences were due to claimant's illness or injury, which constitutes reasonable grounds for claimant's absence from work. In addition, claimant's testimony that she believed her doctor faxed the leave form and doctor's statement to employer was credible. However, employer's testimony that it did not receive notice of claimant's continued absence from work on August 7, 2018 was also credible. Unfortunately, employer did not receive notice that claimant would be absent from August 7, 2018 until August 20, 2018; and it was ultimately claimant's responsibility to notify her employer of her continued absence from work. Because claimant's absences were not properly reported, they are unexcused. Seven unexcused absences in five months are excessive. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The September 11, 2018, (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

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