

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GINA M FINLAY
Claimant

IOC BLACK HAWK COUNTY INC
Employer

APPEAL 16A-UI-11022-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/18/16
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 October 6, 2016 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 25, 2016. The claimant, Gina M. Finlay, participated personally. The employer, IOC Black Hawk County Inc., participated through Employee Relations Manager Tori Jermeland. Claimant's Exhibits 1 was admitted.

ISSUE:

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 as a security guard at the employer's casino. She was employed from June 24, 2014 until September 20, 2016. Her job duties included checking identification of guests and responding to emergency situations. Claimant's immediate supervisor was Cory Kozelka.

The employer has a written attendance and disciplinary policy in place. Claimant received a copy of these policies, along with copies of updates to the policies. The claimant was discharged for absenteeism.

The employer's policy provides that if an employee accumulates ten points, they will be discharged. An employee incurs a point when they are absent for an entire scheduled shift. An employee incurs one half of a point if they are tardy or leave early from a scheduled shift. This policy is a no-fault policy, meaning, the reason for the absence does not matter. If an employee is absent due to injury or illness, a point is still incurred unless it is approved leave under the Family and Medical Leave Act ("FMLA").

Pursuant to the policy, an employee is required to call in and speak to a supervisor to report their absence prior to their shift beginning if they are going to be absent for the entire shift. An employee is not required to call in and report a tardy prior to their shift beginning. Further, the employer does not ask and an employee is not required to provide a reason for the absence when they call in and provide notice to the supervisor.

Claimant was absent for her full shift on the following dates: November 14, 2015; January 3, 2016; January 21, 2016; February 1, 2016; February 16, 2016; April 10, 2016; May 31, 2016; July 7, 2016; September 7, 2016; September 12, 2016; September 16, 2016; and September 19, 2016. Claimant reported all of these absences to her supervisor prior to her schedule shift beginning except the September 19, 2016 date. Her absences on April 10, 2016, July 7, 2016, September 7, 12, 16 and 19, 2016 were all due to illness. Her absence on November 14, 2015 was due to her minor child being ill and needing her to care for her. Claimant did not remember the reasons why she was absent on January 3, 2016; January 21, 2016; February 1, 2016 and February 16, 2016.

Claimant received three written discipline warnings regarding her absenteeism. Those disciplinary notices were received by claimant on January 21, 2016; July 11, 2016; and September 17, 2016. Claimant was aware that her job was in jeopardy if she had another absence under the policy. Claimant had been on FMLA leave for two weeks beginning July 21, 2016 related to a medical condition. She had applied for intermittent FMLA leave in order to cover her absences due to illness related to her medical condition but had not yet been approved for that leave prior to her being discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the claimant was discharged from employment and did not voluntarily quit. As such, this case must be analyzed as a discharge and the burden of proof falls to the employer.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. 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); *Armell 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). 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 (Iowa Ct. App. 2007).

In this case, the claimant had received three written warnings for her absences. The claimant knew that she needed to come to work when scheduled. She understood the attendance policy and knew that she needed to report any absences prior to her scheduled shift start time.

The claimant properly reported each of her absences except the September 19, 2016 absence. However, the absences on November 14, 2015; January 3, 2016; January 21, 2016; February 1, 2016 and February 16, 2016 were due to child care or unknown reasons. As such, claimant

had six unexcused absences in a period of ten months. This amount of absences in this time period is excessive.

The employer has established that the claimant was discharged for job-related misconduct which would disqualify her from receiving benefits. Benefits are denied.

DECISION:

The October 6, 2016 (reference 01) unemployment insurance decision denying benefits is affirmed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

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