

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LACY M RICE
Claimant

PERFICUT COMPANIES INC
Employer

APPEAL 16A-UI-10878-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/21/16
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 03) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on October 19, 2016. The claimant, Lacy M. Rice, participated personally. The employer, Perficut Companies, Inc., participated through Human Resources Generalist Lyndsay Gold.

ISSUES:

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 laborer in the flower department. She was employed from April 11, 2016 until August 19, 2016. Her working hours were typically 7:30 a.m. to 4:00 p.m. Mondays through Fridays each week but those hours could vary depending on weather and seasons. Claimant's supervisor would notify claimant on a daily basis as to what time she was scheduled to work. Claimant's job duties included planting and maintenance of flower beds for the employer's customers. Lisa Fazio was claimant's immediate supervisor.

The employer has a written attendance policy. Claimant did not get a copy of the written attendance policy; however, she was notified verbally by Ms. Fazio that she needed to telephone her prior to scheduled shift beginning if she was going to be late or absent.

There were occasions that claimant was tardy to work. Many of the times she was tardy to work stemmed from her lack of transportation, her reliance on others to transport her to work, or heavy traffic. There were at least four occasions prior to claimant's discharge in which she admits that she was tardy due to these various transportation issues. Claimant had texted Ms. Fazio regarding any dates that she would be tardy.

Claimant received a verbal and written warning regarding her attendance issues on May 3, 2016 from Ms. Fazio. On the written warning the claimant noted that she understood her infraction and apologized for her tardiness.

The final incident occurred on August 18, 2016 when claimant was scheduled to work and was a no-call no-show. Claimant had contracted poison ivy and it had infected her eyes. She was unable to work due to illness. On this date Ms. Fazio was on vacation and an employee named Mike was supervising claimant in her place. Claimant did not have Mike's telephone number to contact him that she would not be in to work due to illness. Claimant did know Ms. Fazio's cell phone number but did not call or text Ms. Fazio about her absence. Claimant did not text her because Ms. Fazio was on vacation that day and claimant did not want to bother her. Claimant reported to work on August 19, 2016 where she was discharged by Ms. Fazio for her failure to report her absence the previous day.

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 denied.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment for job-related misconduct.

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.

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). 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); *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 App. 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.*

Claimant admitted that there were at least four occasions where she was tardy due to transportation issues. While employer testified to more incidents of tardiness, no written documentation or credible testimony was provided regarding additional tardiness in addition to what the claimant admitted to during her testimony. 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 Ms. Rice’s testimony more credible than Ms. Gold’s testimony.

However, even though I find Ms. Rice’s testimony more credible than Ms. Gold’s testimony, the facts support a denial of benefits. In this case, the claimant had received a verbal warning and a written warning regarding her previous tardiness. She knew that she needed to come to work on time. She understood the attendance policy and knew that she needed to report any absences *prior* to her scheduled shift start time. Claimant’s explanation that she did not want to bother Ms. Fazio while she was on vacation is unreasonable. Claimant knew Ms. Fazio’s telephone number and simply needed to send her a text message regarding her absence, as she had done in the past. Had she properly reported her absence, the final incident would have been excused.

In this case claimant was either tardy or absent on five occasions in a four month time period. The dates claimant was tardy which were properly reported were related to transportation and are not considered excused. The final absence, which was for a reasonable reason, i.e. illness, was not properly reported. Five occasions in four months is excessive. The employer has established that the claimant committed job-related misconduct. Benefits are denied.

DECISION:

The October 6, 2016 (reference 03) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as she is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/