

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEYANNA D LEVY
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 21A-UI-25544-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/17/21
Claimant: Appellant (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On November 18, 2021, the Claimant/Appellant filed an appeal from the November 16, 2021, (reference 01) unemployment insurance decision that denied benefits based on claimant being discharged on October 17, 2021. The parties were properly notified about the hearing. A telephone hearing was held on January 18, 2022. Claimant participated in the hearing. Employer participated through Human Resources Administrator, Breana Cook. Administrative notice was taken of claimant's unemployment insurance benefits records.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on May 14, 2018. Claimant last worked as a full-time maintenance generalist. Claimant was separated from employment on October 22, 2021, when she was discharged for excessive absenteeism.

The employer has an attendance policy where an employee is terminated if they reached 10 attendance points. An employee accumulates 1 point if they called in for their shift. An employee receives 3 points if they do not call in or show up for their shift. If an employee is late they receive ½ a point. The employer gives attendance warnings when an employee reaches 3 points, 6 points, and 9 points. Claimant was aware of the employer's attendance policy.

Claimant was late to work September 19, 2021. Claimant called in prior to her shift to notify the employer. Claimant was not sure why she was late for work.

On September 23, 2021, claimant called in late prior to her shift. Claimant was having problems with her older son not sleeping through the night. Claimant was late because she overslept. October 2, 2021, claimant called in to work prior to her shift. Claimant was absent because her 4-year-old child had been molested and she needed to be with her child.

October 7, 2021, and October 8, 2021, claimant was absent from work. Claimant messaged the employer that she would be absent. Claimant is not sure why she was absent.

Claimant was absent on October 14, 2021, claimant called in prior to her shift to notify the employer that she would be late. Claimant had a fight with her children's father and she informed the employer she was running late.

On October 21, 2021, the employer gave the claimant 3 points for being a no call, no show for work. Claimant was on a suspension beginning October 20, 2021. Because of her suspension she was not allowed to work on October 21, 2021. On October 20, 2021, claimant was told by her supervisor, Matthew McKinley, she could return back to work on October 22, 2021.

On October 22, 2021, the employer terminated claimant for accumulating over 10 attendance points in violation of their company's attendance policy.

Claimant received an attendance warning in August 2021 when she accumulated 3 attendance points. Claimant also received warnings when she received 6 points and 9 attendance points. The warnings informed claimant that she could be terminated if her attendance did not improve.

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(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(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 cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

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*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. The termination must be based on a current act. Thus, the final absence must be both excessive and unexcused to result in a finding of misconduct. In this case claimant's last absence was due to claimant being suspended. Claimant was notified on October 20, 2021, that she was being suspended due to a lock out/tag out violation. Claimant's supervisor informed her she could return to work on October 22, 2021. It is reasonable that claimant would not call in to work and inform them that she would be absent on October 21, 2021, because the employer is the one limiting her ability to work. The employer was aware that claimant was not allowed to work and she would not be at work due to her suspension. As a result, claimant's absence was for reasonable ground. Because her last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The November 16, 2021, (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.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

February 11, 2022
Decision Dated and Mailed

cs/mh