

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AVIDAN H TABAK
Claimant

APPEAL 17A-UI-04959-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA CITY COFFEE COMPANY
Employer

**OC: 04/09/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the May 3, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 12, 2017. The claimant participated and was represented by attorney Charles Pierce. Victim Advocate Emily Milke was also present on behalf of the claimant but did not testify. The employer participated through attorney Kristen Frey and owner Tara Cronbaugh. Store Manager Ben Young, Retail Operations Manager Nicole Millard, Chief of Retail Operations Angela Winnike, and Director of Operations Paul Cork also testified on behalf of the employer. Employer's Exhibits 1 through 10 and claimant's Exhibits A through C were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a counter assistant from December 5, 2014, until this employment ended on March 25, 2017, when she was discharged.

On March 24, 2017, claimant was scheduled to come in to work. Claimant was unable to come to work that day because she was experiencing symptoms related to an ongoing medical condition. Claimant called in and spoke to Young, the manager on duty, telling him that she would not be in that day. Young testified he was not sure what to tell claimant, as he was aware of a situation where she left work early on March 21 for similar reasons, so he told her someone would be in contact with her. According to Young, on March 21, he heard claimant say

something to him and told her he would be with her in a minute, but by the time he was free to speak with her she had left. Claimant testified what she had said to Young that day was that she was experiencing symptoms from her medical condition and going home. Claimant testified she believed Young had given her permission to do so. Millard similarly testified that, based on events that occurred earlier in the day, they understood why claimant left early and had chosen to let it go. Claimant testified she was of the understanding Young had given her permission to stay home on March 24. Several attempts were made to contact claimant by members of management, but she did not see those messages until after close of business.

The following day, March 25, claimant was scheduled to work, but did not come in. Claimant testified the reason she did not come in was because she had been told she was being taken off the schedule on Saturdays indefinitely. The employer denied claimant was taken off the schedule and several witnesses testified she was expected to be at work that day. The employer's policies dictate that one incident of a no-call/no-show is grounds for termination. On March 27, 2017, claimant was still experiencing symptoms with her medical condition and again called in sick to work. Claimant was directed to speak with Winnike at that time. When claimant spoke to Winnike she was told she was being discharged. Winnike testified the decision to discharge claimant was based on her no-call/no-show on March 25. Claimant had no prior disciplinary actions related to her attendance nor had she previously been warned her job was in jeopardy.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 9, 2017. The claimant filed for and received a total of \$395.00 in unemployment insurance benefits for the weeks between April 9 and May 13, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on May 2, 2017. The fact finder determined claimant qualified for benefits.

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. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The employer has a no-call/no-show policy that considers employees to have abandoned their job after one no-call/no-show. Since claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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).

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.

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.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant was absent from work on March 24, but called in and notified the manager on duty that she would not be at work that day. Claimant's absence was due to symptoms of an ongoing medical condition. While this absence may not have been excused under the employer's policies, it is excused for the purposes of unemployment insurance benefits. Claimant was absent again on March 25, 2017 and this time did not call in to report she would be absent. This absence was not properly reported and therefore is not considered excused, as a failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. Because her absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Accordingly, benefits are allowed.

Furthermore, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Here, claimant received no warnings or disciplinary action prior to being terminated from employment. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The May 3, 2017, (reference 01) unemployment insurance decision is affirmed. 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs