

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HEATHER L NOVAK
Claimant

LUTHER COLLEGE
Employer

APPEAL 17A-UI-07002-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/11/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 3, 2017, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for repeated tardiness. The parties were properly notified of the hearing. A telephone hearing was held on July 27, 2017. The claimant participated and testified. Also present with the claimant, but not participating in the hearing was Jasmine Boose. The employer participated through Associate Director of Human Resources Matthew Bills. Employer's Exhibits 1 through 7 were received into evidence.

ISSUE:

Was the claimant discharged for 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 custodian from November 9, 2015, until this employment ended on June 14, 2017, when she was discharged.

The employer's attendance and punctuality policy requires employees to be to work on time each day for their scheduled shifts. (Exhibit 1). Claimant was aware of this policy, but struggled with punctuality throughout her employment. These struggles were noted on her 60-day evaluation and 2015-16 performance review. (Exhibits 2 and 3). On January 2, 2017, claimant was issued a written warning for her attendance and advised that if she continued to be late to work she may be discharged. (Exhibit 4). On May 8, 2017, claimant's immediate supervisor, Ivan Heckman, met with her to again discuss her attendance. Heckman informed claimant she had been late for one-third of her shifts since being issued the warning in January. Heckman advised claimant this was her final warning and if things did not improve she would be terminated. Claimant's final tardy was on June 12, 2017. Between the May meeting and June 12 tardy, claimant was late for approximately half of her shifts. The employer testified claimant was an exceptional employee, absent her issues with punctuality, but that it needs employees to

be to work at their scheduled start time. As claimant continued to struggle to meet this requirement, the decision was then made to terminate her employment.

Claimant testified she suffers from depression, anxiety, and ADD. Claimant admitted she was often late to work and that this was most frequently caused by oversleeping, though sometimes it was due to issues with her eight-year-old child, who has a diagnosed behavioral disorder. Claimant explained she had tried several solutions to address the problem. Claimant gave examples of setting multiple alarms, seeing a behavioral therapist, getting a special alarm, and adjusting her wake-up time. When none of these solutions worked, claimant sought medical advice. Claimant's doctor found her iron was low and suggested that might be causing excess sleepiness. When treatment for the low iron did not improve things, her doctor suggested a sleep study. Claimant was discharged before a sleep study could be conducted. Claimant was not able to identify a definitive diagnosed medical condition that led her to oversleep.

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.

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(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. 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* 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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Claimant struggled with tardiness throughout her employment and was given multiple warnings that a failure to appear at work on time may lead to discharge. While claimant's efforts to identify the precise reason for and resolve her issue with oversleeping are applauded and while her desire to solve the problem appears very sincere, her tardiness is an issue of personal responsibility and therefore not excused. The employer has established the claimant was warned that further unexcused absences/tardies could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The July 3, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs