

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SUSAN K BRECHT

Claimant

APPEAL 21A-UI-21957-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KEITH OLTROGGE CPA PC

Employer

OC: 11/08/20

Claimant: Appellant (1)

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Claimant, Susan Brecht, filed an appeal on October 4, 2021 from the September 24, 2021, (reference 03) unemployment insurance decision that denied benefits based upon claimant being discharged August 9, 2021 for excessive unexcused absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on November 23, 2021. The claimant participated. The employer, Keith Oltrogge CPA PC, participated through Keith Oltrogge. Judicial notice was taken of the administrative filed.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the administrative law judge finds: Claimant was employed full time; with a set schedule; with their first day of work being December 11, 2006 and her last day worked being August 16, 2021; when she was separated from employment the same date when she was ninety minutes late to work; and she was discharged for her excessive unexcused absenteeism and tardiness; she had been previously warned.

Employer has and employee handbook. The handbook has policies addressing attendance, tardiness and absenteeism. Claimant was provided a copy of the handbook and was aware of the policies. Claimant's day starts at 8am and she had the following issues:

August 16, 2021	arrived 90 minutes late, no notice;
August 10, 2021	texted at 8am saying in late, and then texted at 11am saying not coming in at all, and then came in at noon and then left at 3 without letting anyone;
August 6, 2021	texted at 8:40am saying not coming in at all;
August 4, 2021	arrived 2 hours late, no notice;

July 30, 2021	texted at 8:30am saying not coming in at all;
July 28, 2021	arrived 2 hours late, no notice;
July 20, 2021	texted at 7am saying not coming in at all;
July 15, 2021	texted at 8:22am saying will be coming in late, arrived at 10am;
July 13, 2021	texted at 8:02am saying will be coming in late, arrived at 10am;

Employer listed more dates in July, June and May. Claimant was asked if she disputed any of the dates or information and she did not. She testified that she usually was late twice a week and missed at least one day a month. Employer discharged claimant for excessive absences effective August 16, 2021. Claimant had been warned at least twice previously about her tardiness and absences and had her hours reduced to part time in the afternoons in November and December 2020 due to her inability to timely report to work. Claimant was aware her position was in jeopardy.

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 section 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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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."

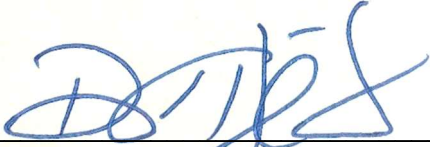
The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. 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*. See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

There are absences/tardiness excessive in number and not excusable (reporting issues). Claimant does not dispute the March 8, 2021 incident that caused termination.

DECISION:

The September 24, 2021, (reference 03) unemployment insurance decision is **AFFIRMED**. Claimant was discharged from employment for a disqualifying reason. 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.



Darrin T. Hamilton
Administrative Law Judge

December 30, 2021
Decision Dated and Mailed

dh/kmj