

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JESSICA R WORDEN
Claimant

SIOUX CITY COMMUNITY SCHOOL DIST
Employer

APPEAL 18A-UI-11109-NM-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 10/21/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 7, 2018, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on November 30, 2018. Claimant participated and testified. Employer participated through Assistant Director of Human Resources Stefanie Verros and Principal Stacie Henderson. Rita Vannatta was also present on behalf of the employer, but did not testify. Employer's Exhibits 1 through 10 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 began working for employer on January 14, 2014. Claimant last worked as a part-time library assistant. Claimant was separated from employment on October 22, 2018, when she was discharged.

The employer's attendance policy states employees are expected to be at work as scheduled and on time. (Exhibit 8). Disciplinary action for attendance issues is left to the discretion of a person's supervisor. On September 28, 2017 claimant was issued a written reprimand for her attendance, after she clocked in late 17 out of 25 days. (Exhibit 2). Claimant was issued a second written reprimand on December 14, 2017. According to that reprimand claimant clocked in late 48 times since August 23, 2017. (Exhibit 4). On May 29, 2018 a third written reprimand was issued to the claimant, stating she had clocked in late 55 times during the second semester of school that year. (Exhibit 6). Claimant was issued a suspension and advised that further incidents with her attendance could lead to termination.

When the new school year began on August 23, 2018, claimant continued to have issues with clocking in to work on time. On September 27, 2018, the students were not in school, but it was

a scheduled work day for staff members. Prior to that date an email had been sent to claimant outlining specific tasks she was supposed to work on for the day. Claimant did not show up to work, nor did she call to report she would be absent. When claimant was spoken to about her absence, she indicated she did not know she was supposed to work. Claimant testified she did normally work on professional development and in-service days, but thought she did not have to on this particular day because the scheduled professional development was cancelled. According to claimant she did not read her email about the work she was supposed to complete that day until a later date.

On October 19, 2018, claimant was sent home early and told that the issue of terminating her from employment based on her attendance was going to be brought up at the school board meeting on October 22, 2018. When the board meeting was held, the decision was made to approve claimant's termination from employment. Claimant was not advised prior to October 19, 2018 that she may be terminated from employment due to her September 27 absence. Verros testified this was because the issue had to be discussed with and the decision approved by multiple people prior to claimant's employment actually ending. Verros was unable to say when these discussions took place or give a reason why they were not had sooner, other than Henderson being out October 1 through 5, 2018.

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(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).

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an

employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Claimant's final attendance occurrence was on September 27, 2018. Henderson spoke to claimant about why she was absent on September 27, but did not notify her she was the subject of an investigation or discussions that may result in her termination. Rather, the employer waited more than three weeks to inform claimant she might be discharged and another three days to notify her of the final decision. The employer could provide no explanation for such an extensive delay. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed.

DECISION:

The November 7, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs