

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MELISSA WILLERS
Claimant

S & J TUBE INC
Employer

APPEAL 19A-UI-08903-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/13/19
Claimant: Appellant (2R)

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

STATEMENT OF THE CASE:

The claimant/appellant, Melissa Willers, filed an appeal from the November 12, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision which denied benefits based upon separation from employment.

The parties were properly notified about the hearing. A first telephone hearing was held on December 5, 2019. The claimant participated personally. Jeanne Mott, vice president/owner, testified. Nicole Hoben and Ronda Hutchinson attended but did not testify. The hearing was continued when the issue of possible incarceration disqualification (Under Iowa Code 96.5(11)) was raised during Ms. Mott’s testimony. After proper notice, a second telephone was held on December 20, 2019. The claimant participated personally. Bruce Morrow, boyfriend of claimant, testified on her behalf. Jeanne Mott represented the employer. Nicole Hoben and Ronda Hutchinson both testified on behalf of the employer. Employer Exhibits 1-7 and Claimant Exhibits A-C were admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a human resources/safety manager beginning July 10, 2017, and was separated from employment on October 16, 2019, when she was discharged (Employer Exhibit 1). The decision to discharge the claimant was made on October 9, 2019 (Employer Exhibit 1).

The claimant was the human resources manager and was familiar with the employer’s rules and policies as it related to social media postings, attendance, and reporting absences. She last physically worked on October 4, 2019. On October 6, 2019, the claimant contacted Ms. Hoben

to change her beneficiary information and to alert her about visiting the hospital (Employer Exhibit 4). She also left a concerning message for Ms. Hutchinson the same day (Employer Exhibit 5). On the same evening, she posted a series of concerning and incoherent Facebook messages which were viewed by her managers, who she had "friended" (Employer Exhibit 7). She was then arrested that evening in the Davenport Walmart for disorderly conduct (Employer Exhibit 6). (The charges were later dismissed. See Claimant Exhibits B, C).

On October 7, 2019, the claimant's boyfriend called the employer, spoke to Ms. Hoben, and reported the claimant had been arrested and would not be at work. The claimant was released from jail on October 7, 2019 but refused to leave with her boyfriend. She walked through town, with no battery in cell phone until she reached a homeless shelter on October 8, 2019. She advised she needed help and was given a phone to call 911. On October 8, 2019, Mr. Morrow called the employer again to report the claimant's absence and informed Ms. Hoben he had been unable to locate the claimant. Later on October 8, 2019, the claimant was located, served by a local sheriff and committed to a local hospital for mental health issues, where she remained through October 16, 2019. Mr. Morrow last contacted the employer on the claimant's behalf on October 9, 2019. The claimant stated she had asked her sister to call the employer while she was hospitalized but there was no evidence by either party that contact was made.

While hospitalized, the claimant's cell phone was confiscated by hospital staff. She was unable to call the employer herself. No one called the employer on behalf of the claimant for her shifts on October 10, 11, or 14, 2019. On October 15, 2019, the employer received a call from a nurse at the hospital on behalf of the claimant, stating she wanted to talk to the employer. The claimant herself contacted the employer on October 16, 2019, to request possible FMLA. At that time, she was told she was discharged.

The claimant is self-employed with a photography business called Memories by Melissa. The issue of whether the claimant is able to and available due to self-employment has not been addressed by the Benefits Bureau.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016) (citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App.Div. 1991)(per curiam)).

Iowa Code section 96.5(11)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

11. *Incarceration –disqualified.*

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue 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.

In the specific context of absenteeism, the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“rule [2]4.32(7)...accurately states the law”).

Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. 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 requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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). However, there are instances in which a claimant may be unable to report an absence due to illness and it may still be considered unexcused. 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.

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep’t of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

In this case, the employer discharged the claimant for a series of events between October 6-9, 2019. Prior to her arrest on October 7, 2019, the claimant initiated several phone calls to management in which she was incoherent and alerted the employer to the fact she was seeking hospitalization. During this same period, while off-duty, she posted incoherent, unprofessional messages on her private Facebook page, which was viewable to some employees who she had “friended”. None of the messages referenced her workplace or were regarding work issues. The administrative law judge recognizes these contacts to her manager and on Facebook were not professional but is not persuaded would be egregious enough to be deemed misconduct.

The claimant was arrested on October 7, 2019 (and ultimately the charges were dismissed). Her boyfriend made contact with the employer on October 7, 8 and 9, 2019 to alert the employer of her whereabouts and to report her absences. When the claimant was released from incarceration, she wandered through town until she called 911 to be hospitalized. In light of the evidence presented, she lacked the mental capacity to be able to report back to work immediately after incarceration, and thereafter, was hospitalized from October 8-16, 2019, and unable to report to work or have access to a phone due to the nature of her hospitalization. In light of her incapacity, the administrative law judge is persuaded Mr. Morrow's contacts on behalf of the claimant on October 7, 2019 and when the decision to discharge was made on October 9, 2019 would be considered proper notification under the circumstances.

The administrative law judge is sympathetic to the employer, who clearly tried to work with the claimant by not moving forward with discharge sooner. When analyzing a discharge for unemployment insurance eligibility, the focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). While the claimant was absent October 8 and 9, 2019 after incarceration, she was also hospitalized and unable to report her absence. Her boyfriend did maintain contact with the employer and based on management's own contact with her prior to arrest, the employer could have reasonably concluded she was unable to report her own absences. Because the claimant's final two absences on October 8 and 9, 2019 were due to illness and reported as soon as possible, by Mr. Morrow, the administrative law judge concludes the claimant's final absences would be considered excused for purposes of determining unemployment insurance benefits eligibility.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the 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, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

REMAND: The issue of whether the claimant is able to and available due to self-employment is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The unemployment insurance decision dated November 12, 2019, (reference 01) is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed provided she is otherwise eligible. **REMAND:** The issue of whether the claimant is able to and available due to self-employment is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Jennifer L. Beckman
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Decision Dated and Mailed

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