

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHARON M O'CONNOR
Claimant

CARGILL INCORPORATED
Employer

APPEAL 17A-UI-10407-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/17/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 5, 2017, (reference 01) unemployment insurance decision that denied benefits based on her discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on October 30, 2017. The claimant participated and testified. The employer participated through Production Supervisor Danae Lillie. Also present, but not testifying, on behalf of the employer was Brandi Kinkade. Employer's Exhibits 1 through 3 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 production technician 2 from December 10, 2012, until this employment ended on September 12, 2017, when she was discharged.

The employer's attendance policy allows employees to accumulate three attendance occurrences within a rolling calendar before disciplinary action is taken. (Exhibit 2). Employees receive documented coaching after the third occurrence, a written warning after the fourth occurrence, and after a fifth occurrence are placed on an attendance plan. Lillie further testified that, under the employer's attendance policy, if an employee is not present and has not called in by 9:00, it is considered a no-call/no-show. Claimant testified she was generally aware of the employer's attendance policy, but was unaware that absences without a call by 9:00 were considered a no-call/no-show. Language to this affect is not found in Exhibit 2.

On February 15, 2017, claimant was issued a written warning for her attendance between February 15, 2016 and February 15, 2017. (Exhibit 1). Claimant missed work on four separate occasions during this time frame, each time due to illness. The warning advised claimant failure to improve her attendance would lead to discharge. On April 9, 2017, claimant also called in sick. Each time claimant was unable to work due to illness she called and properly reported her absence. On September 9, 2017, claimant was scheduled to be to work by 6:45 a.m. Claimant overslept, but called her shift leader as soon as she woke up at 12:15 p.m. Claimant then came

in to work and worked the remainder of her shift. Two days later, on September 11, claimant again was supposed to be to work by 6:45 a.m., but overslept. Claimant called work between 11:00 and 11:30, but was told not to come in, as she was being placed on suspension. Claimant was subsequently discharged based on her attendance.

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.

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). 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. Here, all of claimant's occurrences prior to September 9, 2017 were properly reported absences due to illness and therefore excused for the purposes of unemployment insurance benefits. Claimant's absences on September 9 and 11, 2017, were due to oversleeping and therefore not excused. However, two unexcused absences do not meet the excessiveness standard. As the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility, benefits are allowed.

DECISION:

The October 5, 2017, (reference 01) unemployment insurance decision is reversed. 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