

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

APRIL M NEHLS
Claimant

PETSMART INC
Employer

APPEAL 17A-UI-09605-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/20/17
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 6, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 6, 2017. Claimant participated. Employer participated through hearing representative Karen Stonebraker and store leader Brad Bauer. Claimant Exhibit A was admitted into evidence with no objection.

ISSUE:

Is the appeal timely?

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on September 6, 2017. Claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by September 16, 2017. September 16, 2017 was a Saturday; therefore an appeal had to be filed by Monday September 18, 2017. Claimant filed her appeal on September 18, 2017.

The employer has a written policy that if an employee has two consecutive days of no-call/no-show they are deemed to have voluntarily quit. The employer requires employees to personally call it one hour prior to the start of their shift to report their absence. Claimant was aware of the policies.

The last day claimant worked for the employer was on August 14, 2017. Claimant was next scheduled to work on August 15, 16, 17, and 18, 2017. On August 15, 2017, claimant called the

employer and reported that she would be absent due to a death in the family. The employer excused her absence on August 15, 2017.

Claimant did not work on August 16, 17, and 18, 2017. Claimant did not personally call the employer to report her absences on August 16, 17, and 18, 2017. On August 16, 2017, claimant tried to contact the employer multiple times, but she did not have service in the small town that she was at and was not successful in contacting the employer. Claimant Exhibit A. On August 16, 2017, claimant went to the hospital due to kidney stone issues. The employer did not hear from claimant or anyone else regarding her absence on August 16, 2017.

On August 17, 2017, claimant was in the hospital and under medication. Claimant's ex-husband tracked her down at the hospital and called her at the hospital. Claimant asked her ex-husband to let the employer know she was going to absent. Claimant's ex-husband went to the employer and spoke to the assistant store leader. Claimant's ex-husband told the assistant store leader that claimant was in the hospital and she did not know when she would be released. The assistant store leader told the ex-husband that claimant needed to call the employer.

On August 18, 2017, claimant spoke to her ex-husband again from the hospital and she asked him to contact her employer again. Claimant's ex-husband then went to the employer spoke to Mr. Bauer. Claimant's ex-husband told the employer that claimant was in the hospital. Mr. Bauer told claimant's ex-husband that the employer has clear policies requiring claimant to call the employer.

On August 20, 2017, claimant was released from the hospital. Claimant did not have phone service while she was in the hospital. Claimant testified she was not in a state of mind to make phone calls while she was in the hospital due to her medication. After claimant was released from the hospital, she called the employer and a manager told her to come to work on August 21, 2017 from 7:00 a.m. to 3:30 p.m.

On August 21, 2017, claimant came to work at 7:00 a.m. and tried to clock in, but she was not able to. Claimant went and spoke to a manager about the issue. The manager told claimant they did not know what was going on and told her to call Mr. Bauer at 9:00 a.m. At 9:23 a.m. claimant called Mr. Bauer and stated I guess I do not have a job. Mr. Bauer told claimant she did not have a job because she was a no-call/no-show for several shifts.

On April 21, 2017, the employer gave claimant a verbal warning for a no-call/no-show on April 20, 2017. The employer discussed the no-call/no-show policy with claimant. Claimant was warned her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information

concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the appeal deadline was a Saturday, September 16, 2017, claimant had until Monday, September 18, 2017 to file her appeal. Claimant filed her appeal on September 18, 2017, thus, she timely filed her appeal.

The next issue is whether claimant voluntarily left the employment with good cause attributable to the employer or did employer discharge her for reasons related to job misconduct sufficient to warrant a denial of benefits. The administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(1) provides:

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

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Iowa Code section 96.5(2)a provides:

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

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 disqualification 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.

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.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992).

In this case, claimant clearly did not intend to end her employment with the employer. Claimant had her ex-husband personally go to the employer on August 17 and 18, 2017, to inform it she would be absent from work because she was in the hospital. Although claimant did not personally contact the employer, she did have her ex-husband personally go to the employer to inform it she was going to be absent because she was in the hospital. By having her ex-husband report her absences and the reason for her absences to the employer on August 17 and 18, 2017, claimant substantially complied with the employer's notification policy and her absences on August 17 and 18, 2017, are not considered no-call/no-shows. Since the employer does not have a policy as set out in Iowa Admin. Code r. 871-24.25(4) and claimant did not have three consecutive no-call/no-shows, the separation was not due to failure to call or report for three days and claimant's separation is considered a discharge.

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). 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) (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 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, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). 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.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743

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.

On August 16, 17, and 18, 2017, claimant was absent from work because she was in the hospital. Claimant was in a small town and she did not have cell phone service. On August 16, 2017, claimant attempted to contact the employer multiple times but was unsuccessful due to a lack of phone service. Claimant Exhibit A. Even if, claimant's absence on August 16, 2017 was considered a no-call/no-show, she still reported her absences to the employer on August 17 and 18, 2017 through her ex-husband. The employer's argument that claimant's absences on August 17 and 18, 2017 are considered no-call/no-shows because its policy requires claimant to personally report her absences, is not persuasive. In the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007). Claimant testified on August 17 and 18, 2017 she did not have phone service in the hospital and she was under medication, which made her unable to make phone calls. Although claimant did not personally contact the employer, she did have her ex-husband personally go to the employer to inform it she was going to be absent because she was in the hospital. By having her ex-husband report her absences and the reason for her absences to the employer on August 17 and 18, 2017, claimant substantially complied with the employer's notification policy.

Because claimant's last absences (August 17 and 18, 2017) were 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.

DECISION:

The September 6, 2017, (reference 01) unemployment insurance decision is reversed. Claimant's appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs