

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MACKENZIE SCHABILION
Claimant

DEPARTMENT OF THE ARMY
Employer

APPEAL 20A-UI-12518-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/28/20
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the September 30, 2020 (reference 01) unemployment insurance decision that denied unemployment insurance benefits to the claimant based upon her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on December 9, 2020. The claimant, Mackenzie Schabilion, participated personally. The employer, Department of the Army, was represented by Katie Taki and participated through witnesses Katie Olson and Elissa Lewandowski. Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's administrative records.

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 contract specialist. She was employed from October 28, 2018 until July 1, 2020. Claimant's immediate supervisor was Katie Olson. Claimant's normal working hours were Monday through Friday from 8:00 a.m. to 5:00 p.m. She was working from home at the end of her employment. Claimant was required to send an email to her supervisor at the beginning and end of her work days while she was teleworking from home.

On June 1, 2020, the claimant requested to use leave for a vacation she was planning out of the State of Iowa from June 5, 2020 through June 17, 2020. She was scheduled to travel to her uncle's home to assist him with a medical condition.

On June 2, 2020, the claimant had been warned about her repeated tardiness logging on to her computer and sending Ms. Olson an email in the morning when she was working. She was informed that continued unplanned, unexcused absences will be treated as AWOL, which can be grounds for disciplinary action. See Exhibit 1.

Claimant's request for annual vacation leave was denied on June 2, 2020 because she did not have enough leave accrued to use. Claimant requested advanced annual leave and was denied. Claimant requested to use sick leave and was denied. Claimant requested to use advanced sick leave and was denied. Claimant requested to use leave without pay and was denied.

On June 4, 2020, Ms. Olson contacted the claimant by telephone to determine whether she would be working June 5, 2020 through June 17, 2020. The claimant confirmed with Ms. Olson that she still intended to take her trip to her uncle's home even though she did not have any approved time off to cover her absences.

Claimant had no contact with Ms. Olson on June 5, 2020, June 8, 2020, June 9, 2020 and June 10, 2020. She did not work June 5, 2020 through June 10, 2020 and did not have approved leave for those specific dates. On June 11, 2020, claimant contacted Ms. Olson stating that she was sick and was unable to work due to a migraine. See Exhibit 1. Claimant contacted Ms. Olson after her normal shift was already scheduled to begin. See Exhibit 1. Ms. Olson responded that she believed she was AWOL as she had previously told her that she planned to go on her trip even though she was not approved for leave. See Exhibit 1. Claimant responded that she did not go on her trip but gave no reason for why she was not at work on June 5, 2020, June 8, 2020, June 9, 2020 and June 10, 2020.

On June 12, 2020, claimant contacted Ms. Olson that she was again ill and needed to use sick leave. See Exhibit 1. Ms. Olson responded that she was requiring a doctor's note for June 11, 2020 and June 12, 2020 for her requested sick leave. See Exhibit 1. No doctor's note for June 11, 2020 and June 12, 2020 was provided to Ms. Olson.

On June 15, 2020, the claimant notified Ms. Olson again that she was ill and requested use of her sick leave. Ms. Olson again requested a doctor's note for June 11 and 12, 2020 as well as for June 15, 2020.

The claimant was absent from work on June 16, 2020. The claimant did not notify Ms. Olson of the reason she was absent or have approved leave. The claimant was absent from work on June 17, 2020. The claimant did not notify Ms. Olson of the reason she was absent or have approved leave. On June 18, 2020, the claimant contacted Ms. Olson stating that her telephone had not been working. See Exhibit 1.

On June 19, 2020, the claimant logged back on for work for her normal hours and continued her normal work schedule until her discharge on July 1, 2020. The claimant submitted Family and Medical Leave Act (FMLA) paperwork from her medical provider to Ms. Olson on June 29, 2020. The FMLA documentation did not include the dates for which she was absent from work without approved leave.

Claimant had received a previous warning on April 27, 2020 about her attendance issues as the employer believed she was making food deliveries for another employer at the same time she was scheduled to work for this employer. She was warned that further attendance issues could lead to disciplinary action.

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. Benefits are denied.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

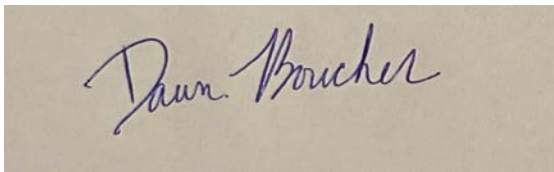
The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.* Excessive absenteeism has been found when there have 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. See *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).

The claimant had received a previous warning regarding absenteeism. The claimant was absent from work on June 5, 2020; June 8, 2020; June 9, 2020; June 10, 2020; June 11, 2020; June 12, 2020; June 15, 2020; June 16, 2020; June 17, 2020; and June 18, 2020. She only notified the employer of her absences due to illness on June 11, 12, and 15, 2020. No other contact was made during the dates she was not at work. Seven unexcused absences in this

short period of time is considered excessive. The claimant was warned that further unexcused absences could result in discipline, including discharge, and the final absence on June 18, 2020 was unexcused. The final absence, in combination with the claimant's history of unexcused absenteeism, amounts to job-related misconduct. Benefits are denied.

DECISION:

The September 30, 2020 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her separation date, and provided she is otherwise eligible.

A rectangular box containing a handwritten signature in blue ink that reads "Dawn Boucher".

Dawn Boucher
Administrative Law Judge

December 17, 2020
Decision Dated and Mailed

db/scn