

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KENYA LOVELESS

Claimant

APPEAL 19A-UI-07782-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRAPETREE MEDICAL STAFFING INC

Employer

OC: 09/15/19

Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant/appellant, Kenya Loveless, filed an appeal from the October 1, 2019, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 25, 2019. The claimant participated. The employer participated through Zach Myer, human resources specialist. Administrative Law Judge Andy Duffelmeyer observed for training purposes only. Claimant Exhibit A and Employer Exhibits 1-13 were admitted into evidence. 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.

NOTE TO EMPLOYER:

If you wish to change the address of record, please access your account at: <https://www.myiowaui.org/UITIPTaxWeb/>.

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 part-time as a CNA and was separated from employment on September 16, 2019 when she was discharged for excessive absences (Employer Exhibit 12).

The claimant was trained on the employer policies at hire (Employer Exhibits 3, 4, 5). The claimant was permitted to sign up and pick her own schedule, but expected to adhere to it upon commitment (Employer Exhibit 2). If the claimant was unable to work a shift, she was expected to notify a staffing specialist 12 hours in advance (Myer testimony). The employer tracked attendance infractions over a rolling twelve-month period and considered an absence unexcused if coverage was not found by the employee to cover the shift, or documentation (such as medical or an obituary) was not furnished to support the absence (Employer Exhibit 2).

The employer was unaware if the claimant properly reported her absences but took into consideration the following absences when deciding to discharge the claimant: (Employer Exhibit 12):

September 22, 2018	Car problems
December 15, 2018	Daughter missing
December 31, 2018	Illness
January 18, 2019	Left early due to illness
January 26, 2019	Illness (chest pains)
February 26, 2019	Broken window
March 17, 2019	"Jumped" that day
September 15, 2019	In Chicago with family
September 16, 2019	Did not return from Chicago in time to work/transportation

Prior to separation, the claimant was issued written warnings for her attendance on September 25, 2018 (Employer Exhibit 6) and February 27, 2019 (Employer Exhibit 7). The claimant was placed on a final written warning effective March 19, 2019 (Employer Exhibit 8) and acknowledged she knew her job was in jeopardy (Loveless testimony).

The claimant's grandfather passed away on September 6, 2019. She notified the employer and her absence from work on September 7, 2019 was excused in response. On September 9, 2019, the claimant picked up a shift for September 15, 2019 at 3:00 p.m. The claimant last performed work on September 12, 2019. On September 13, 2019, the claimant picked up a shift for September 16, 2019 at 3:00 a.m.

The claimant went to Chicago to attend her grandfather's funeral, which was held on September 14, 2019 (Employer Exhibit 11). The claimant remained with family and friends reminiscing and socializing in Chicago on September 15, 2019 and did not report to the employer that she would miss her 3:00 p.m. shift until 1:19 p.m. She did not secure coverage for the shift.

The claimant was then scheduled to work at 3:00 a.m. on September 16, 2019. She notified the employer at 11:11 p.m. that she would not be working her shift in the morning. She left Chicago around 4:00 a.m. on September 16, 2019 to return to Davenport. (She did not attend the scheduled burial for noon on September 16, 2019). (Employer Exhibit 11). The claimant stated she delayed alerting the employer to the absences because she attempted to find coverage. She delayed returning to Davenport because her driver needed to sober up. She thought the employer would take into consideration that she had been in Chicago due to her grandfather passing away, but she was instead discharged (Employer Exhibit 12).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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”).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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.

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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit, supra*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

In this case, the claimant had three absences (12/31/18, 1/18/19 and 1/26/19) that she reported were due to illness. The employer was unsure if the claimant properly reported the absences. Even if those absences were considered excused (because of the reason and assuming they were properly reported), the claimant still had absences on 9/22/18, 12/15/18, 2/26/19 and 3/17/19, which would not be considered excused, even if properly reported, based upon the reasons for the absences. Prior to the final incident, the claimant had a minimum of four unexcused absences.

The administrative law judge is persuaded the claimant’s absences on September 15 and 16, 2019 would also be considered unexcused for purposes of determining unemployment insurance eligibility. Neither absence was properly reported per the employer’s policy. Further, while the administrative law judge is sympathetic to the claimant’s loss of her grandfather, it cannot be ignored that her absences on September 15 and 16, were not related to his funeral, but rather socializing the two days following the funeral itself, and due to transportation issues. These are not excusable absences. Accordingly, the administrative law judge concludes the claimant had at least six unexcused absences between September 22, 2018 and September 16, 2019.

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. 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). In the case at hand, the claimant had at least six unexcused absences in a twelve-month period. This is clearly excessive.

Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absences on September 15 and 16, 2019 were not excused. The final absences, in combination with the claimant's history of unexcused absenteeism, are considered excessive. The employer has met its burden of proof to establish the claimant was discharged for disqualifying job-related misconduct. Benefits are withheld.

DECISION:

The October 1, 2019, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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