

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JANET B FOSTER**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 15A-UI-09911-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/28/15**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from the August 28, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 17, 2015. Claimant did not participate. Employer participated through hearing representative, Alice Rose Thatch and store human resources manager, Julie Jones. Employer Exhibit One was admitted into evidence with no objection.

**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 part time as a bakery clerk from February 19, 2015, and was separated from employment on June 22, 2015, when she was discharged.

The employer has an attendance policy that requires employees to call in two hours prior to their shift if they are going to miss or be late to work. Employer Exhibit One. The employer does not require a doctor's note if the employee is ill. Employer Exhibit One. Claimant was made aware of the employer's policy during orientation, the handbook, and a written warning on June 19, 2015. Employer Exhibit One.

The final incident occurred when claimant was tardy on June 21, 2015 to her shift. Claimant was forty-three minutes late to work. Claimant did not follow the proper procedure to let the employer know she was going to be late. Ms. Jones contacted claimant on June 22, 2015, and told her she was discharged. Claimant was discharged for attendance and because she had just been written up on June 19, 2015. Employer Exhibit One.

Claimant was last warned on June 19, 2015, that she faced termination from employment upon another incident of unexcused absenteeism. Employer Exhibit One. Claimant missed two consecutive days on June 16 and June 17, 2015. Employer Exhibit One. On June 16, 2015, claimant missed work for a medical appointment for her spouse. Employer Exhibit One.

Claimant knew ahead of time she was going to miss work, but she waited until Ms. Jones called during her shift to say she was going to miss work. The employer does not believe it was properly reported and considered it unexcused. On June 17, 2015, claimant called in to say she was ill. Ms. Jones is unsure if claimant called in two hours prior. Claimant did not have to provide a doctor's note, but she did provide a doctor's note allowing her to return to work on June 19, 2015. Claimant was notified that her job was in jeopardy. Ms. Jones informed claimant the impact on the employer of her not following the proper procedures when she is going to miss work. That was the only warning claimant received for absenteeism. Claimant's manager did have verbal conversations about absences, but these were not documented. The only other documented absence was a family emergency in April.

## 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. Benefits are allowed.

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.

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(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). 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*.

An employer's attendance policy 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 the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Claimant was discharged for attendance and because she had just been written up on June 19, 2015. Employer Exhibit One. Claimant had only four documented absences. Employer Exhibit One. One was a reported family emergency in April 2015. Employer Exhibit One. The next two were medical related; however, the absence on June 16, 2015 was not properly reported; the employer had to call claimant during her scheduled shift to see why she was not at work. On June 17, 2015, claimant properly reported she would not be to work because she was ill. Claimant received a written warning on June 19, 2015 for these two absences. This was her only warning for her absences. On the last incident, claimant was forty-three minutes late to work and did not contact the employer about being late. Employer Exhibit One. Although claimant's last absence and her absence on June 16, 2015 may be considered unexcused; two unexcused absences is not excessive for the purposes disqualifying claimant from unemployment insurance benefits.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Benefits are denied.

**DECISION:**

The August 28, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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