

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**KIMBERLY N JOHNSON**  
Claimant

**ZENDERS INC**  
Employer

**APPEAL 17A-UI-05928-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/14/17**  
**Claimant: Appellant (2)**

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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 filed an appeal from the June 2, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for repeated tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on June 27, 2017. The claimant, Kimberly N. Johnson, participated. The employer, Zenders, Inc., did not register a telephone number at which to be reached and did not participate in the hearing. Claimant's Exhibit A was received and admitted into the record.

**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, most recently as an esthetician and spa manager, from November 2014 until May 15, 2017, when she was discharged for tardiness in reporting to work. Claimant testified that her regular work schedule was Tuesdays, Thursdays, Fridays, and every other Saturday. On Monday, May 15, 2017, claimant received a telephone call notifying her that she was scheduled to work that day and her first appointment would be starting in ten minutes. Claimant immediately went to work and arrived on time for the appointment. Claimant testified that she had submitted a time-off request several weeks prior in which she stated she could make up her hours on May 15 or another day. However, the employer stated it would follow up with her and no one ever confirmed when she would be making up her hours. Claimant had been late to work on one prior occasion, due to a doctor's appointment running long. Claimant called the employer to report that she would be late for this reason. She arrived before her first appointment and took all her appointments on time that day.

Claimant testified that the employer required each employee to arrive fifteen minutes prior to her first scheduled guest. Claimant met this expectation during her employment. She occasionally did not clock in fifteen minutes prior, as the spa computer had issues and would often need to

be rebooted before claimant could log in. In those circumstances, claimant testified, she would restart the computer and then set up her treatment room and work on side work while the computer was rebooting. Claimant received one warning from the employer related to her attendance. The Thursday before claimant was discharged, she was warned that she needed to begin clocking in the full fifteen minutes before her first appointment. Claimant was not aware her job was in jeopardy due to attendance.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

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. 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.

Here, the final incident involved claimant failing to meet the employer's expectation that she arrive fifteen minutes prior to the start of her shift on May 15, 2017. Claimant provided unrefuted testimony that she was never told she was scheduled for this shift. She first learned that she was expected to work that day when she received the telephone call ten minutes prior to her first appointment. Because claimant was never notified that she was scheduled for May 15, her failure to report for that shift was not a volitional absence. Benefits are allowed.

#### **DECISION:**

The June 2, 2017 (reference 01) unemployment insurance decision is reversed. 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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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

lj/scn