

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JESSICA ZEIEN-COX
Claimant

CBE COMPANIES INC
Employer

APPEAL 20A-UI-02411-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/23/20
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant, Jessica Zeien Cox, filed an appeal from the March 9, 2020 (reference 02) Iowa Workforce Development (“IWD”) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on April 29, 2020. The claimant participated personally. She was represented by Thomas P. Frerichs, attorney at law. The employer, CBE Companies, participated through Brittney Ranschau, operations manager. Mary Phillips and Amanda Ganois also participated on behalf of the employer.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Claimant Exhibit A and Employer Exhibits 1-7 were admitted. 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.

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 full-time as a collector and was separated from employment on February 19, 2020, when she was discharged for failing to properly report her tardy on February 19, 2020 (Employer Exhibit 1).

The employer has a written policy which requires that employees must call in thirty minutes prior to their shift to report an absence or late arrival (Employer Exhibit 6). The claimant was trained on this policy and retrained with each warning she received.

Prior to discharge, the claimant had been verbally “coached” on June 5, 2019, for not calling in prior to her shift (Employer Exhibit 5). The claimant was issued a documented verbal warning on August 22, 2019 after she failed to report as directed (Employer Exhibit 4). On December 20, 2019, the claimant received a written warning for failing to notify the employer she was

going to be tardy to her shift (Employer Exhibit 3). The claimant received another written warning on February 5, 2020, when she failed to call in and report she was going to be tardy (Employer Exhibit 2). The warning stated, "Jess is expected to call in prior to the start of her scheduled shift and inform a member of management if she is going to be late or not attending her scheduled shift. Any further instances will result in termination" (Employer Exhibit 2). The claimant informed the employer each time that she was tardy and failed to report her absence, it was due to oversleeping.

On February 19, 2020, the claimant did not arrive on time to work her 8:00 a.m. shift. She did not notify the employer thirty minutes prior to her shift that she would be late. At 8:19 a.m., the claimant notified the employer she was running late. She reported to the employer she had overslept. She told a co-worker she had overslept due to period cramps and fighting with her significant other the night before. The claimant arrived to work late and was permitted to work until she was discharged in the afternoon, prior to her shift ending.

The claimant opined that she was discharged due to medication related to her mental health. The claimant acknowledged to employees she had personal stress while employed, including being the mother to twin babies. She had been provided FMLA paperwork by the employer, but she did not take it to her doctor, stating she was too busy with her children and work. She also stated that her medication made her sleep so hard that she would miss 17 alarms in one day, but did not visit a doctor to discuss dosage or side effects from the medication that were reportedly impacting her ability to get to work on time. The claimant did not provide medical documentation to the employer or for the hearing which supported that her inability to report her tardiness on time or to her shifts was due to a medical condition or medication.

The claimant also asserted she was not discharged for a current act, because she was permitted to work upon her late arrival until mid-afternoon when she was discharged (Claimant Exhibit A).

REASONING AND CONCLUSIONS OF LAW:

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

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 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).

As a preliminary matter, the act for which the claimant was discharged was considered a current, final act of misconduct.

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.

A lapse of 11 days from final act until discharge when claimant was notified on fourth day that his conduct was grounds for dismissal did not make final act a "past act". *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

The final incident must occur within a reasonable period from the discharge date. The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. The issue is when the employer learned of the current act and did it act to terminate the individual within a reasonable period of time. The administrative law judge is persuaded that allowing the claimant to work less than one full shift on February 19, 2020, after the final incident occurred that same morning does not make the final act no longer current or a "past act" for purposes of determining unemployment insurance eligibility.

The next issue to address is whether her discharge was due to disqualifying job-related misconduct, according to Iowa 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. The. 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 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). 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 credible evidence supports the claimant had five tardies between August 22, 2019 and February 19, 2020, in which she overslept and failed to notify the employer she was running late for work. The administrative law judge is sympathetic to the claimant, but no competent, medical documentation was provided to the employer or at the hearing that the claimant’s failure to wake up on time or be able to call the employer prior to her shift was attributable with a medication or medical issue.

Arguably, if a medication or condition was causing the claimant to sleep through 17 alarms, as she stated, a reasonable person would notify their doctor that they were experiencing severe side effects which were impacting their daily activities. The claimant did not do that or visit a doctor even when offered FMLA paperwork. Further, it cannot be ignored that the claimant disclosed to employees other issues that likely contributed to her oversleeping, such as having twin babies at home and issues with her personal relationship. For these reasons, the administrative law judge concludes the claimant’s five tardies, which were not properly reported (regardless of reason) were unexcused.

The second step in the analysis is to determine whether the unexcused absences were excessive. 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). Excessiveness by its definition implies an amount or degree too great to be reasonable or

acceptable. The claimant in this case had five unexcused tardies in less than six months, and four warnings. The claimant's repeated tardiness was excessive.

Based on the evidence presented, the claimant knew or should have known her job was in jeopardy if she overslept again and did not notify the employer prior to her shift that she would be late. Her most recent warning was two weeks prior to the final incident. Her conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. The employer has satisfied its burden of proof that the claimant was discharged for disqualifying job-related misconduct. Benefits are withheld

In the alternative, if this case was analyzed as an insubordination case, rather than attendance, the claimant would remain disqualified from benefits.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The claimant repeatedly did not notify her employer she would be late to her shifts, and for the reasons explained above, failed to establish it was something that could not be avoided, whether by setting up different alarms systems, having a family member or significant other wake her up, or visiting her doctor when she realized she was reportedly sleeping through 17 alarms in one day. The claimant failed to establish good cause to mitigate her noncompliance with the employer's reasonable rules. The employer has established the claimant was discharged for misconduct, and therefore, benefits are denied.

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

DECISION:

The unemployment insurance decision dated March 9, 2020, (reference 02) 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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May 18, 2020
Decision Dated and Mailed

jlb/mh