

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SKYY LOVEJOY
Claimant

HARVEYS IOWA MANAGEMENT CO INC
Employer

APPEAL 21A-UI-20503-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/25/21
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, Skyy Lovejoy, filed an appeal from the September 7, 2021, reference 01, unemployment insurance decision that denied benefits based upon the conclusion she was excessively absent from work. The parties were properly notified of the hearing. A telephone hearing was held on December 1, 2021. The claimant participated. The employer participated through Human Resources Generalist Mitchell Parker and Hotel Operations Manager Robin Reber. The employer was represented by Unemployment Insurance Representative Dave Peterson. Exhibits 1, 2, 3, and 4 were received into the record.

ISSUE:

Whether the claimant's separation from employment was disqualifying?

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 hotel front desk agent from September 26, 2021, until this employment ended on June 25, 2021, when she was discharged. The claimant's immediate supervisor was Hotel Supervisor Sandy Nugent. The claimant worked eight-hour shifts beginning at either 10:00 a.m. or 12:00 p.m. on Mondays, Tuesdays, and Fridays.

The employer has an attendance policy in its employee handbook. The attendance policy requires an employee to notify the employer of an anticipated absence at least two hours prior to the start of their shift. If the employee calls in with proper notice, they accrue one attendance point. If an employee calls in 45 minutes or less before the start of their shift, then they accrue 1.5 points. If an employee is tardy for a duration less than two hours, then they accrue .5 attendance points. After an employee has accrued 8 points, then they receive a final written warning. After they have accrued 10 points or more, then they are terminated. The employer provided a copy of the attendance policy. (Exhibit 1) The claimant received a copy of the employee handbook. The employer provided a copy of the claimant's acknowledgement of

receipt of the handbook. (Exhibit D-2) This information was also covered with her during her orientation.

On September 12, 2020, the claimant called in prior to the start of her shift and informed her supervisor she would not be working that day. The claimant did not give an explanation.

On September 28, 2020, the claimant arrived at work at 11:06 a.m. for a shift beginning at 10:00 a.m.

On October 26, 2020, the claimant arrived at work at 1:45 p.m. for a shift beginning at 10:00 a.m.

On November 7, 2020, the claimant called in prior to the start of her shift. The claimant informed the employer she would not be working that day. She did provide a justification.

On November 16, 2020, the claimant arrived at work at 10:19 a.m. for a 9:00 a.m. shift.

On December 12, 2020, the claimant arrived at work at 12:20 p.m. for a 12:00 p.m. shift.

On January 30, 2021, the claimant arrived at 2:00 p.m. for an 11:00 a.m. shift.

On February 20, 2021, the claimant arrived at 9:19 a.m. for a 9:00 a.m. shift.

On February 23, 2021, the claimant called in prior to the start of her shift to inform the employer she would be absent that day. The claimant did not give a justification. The claimant needed that time off to recuperate from her gallbladder surgery that occurred earlier that week.

On April 5, 2021, the claimant arrived at work at 12:19 p.m. for a shift beginning at 10:00 a.m.

On April 26, 2021, the claimant arrived at work at 12:30 p.m. for a shift beginning at 10:00 a.m.

On May 22, 2021, the claimant arrived at work at 12:15 p.m. for a shift beginning at 10:00 a.m.

On May 24, 2021, the claimant arrived at work at 12:30 p.m. for a shift beginning at 10:00 a.m.

In May 2021, the claimant's vehicle began leaking power steering fluid and had a bad alternator. The claimant had arranged for carpooling until her vehicle could be fixed.

On May 25, 2021, the claimant arrived at work at 11:22 a.m. for a 10:00 a.m. shift.

On May 28, 2021, the claimant received a final written warning for attendance. The final written warning read in pertinent part, "Further infractions may result in further progressive discipline up to and including separation from employment." The employer provided a copy of the final written warning. (Exhibit 5)

On June 25, 2021, the claimant arrived at work at 10:30 a.m. for a shift beginning at 10:00 a.m. That same day, the claimant was discharged by Ms. Nugent and Director of Hospitality Jennifer Henry. The employer provided a copy of the claimant's termination notice. (Exhibit 3)

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.

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(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.

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).

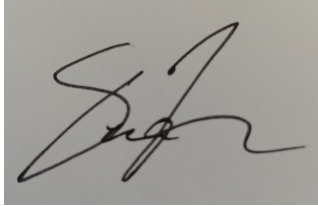
Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness 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 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further improperly reported unexcused absences could result in termination of employment and the final absence was not properly reported excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The September 7, 2021, reference 01, unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. 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.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

January 7, 2022
Decision Dated and Mailed

smn/kmj