

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BENDU B DOEWAY
Claimant

BROADLAWNS MEDICAL CENTER
Employer

APPEAL 19A-UI-00201-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/09/18
Claimant: Appellant (1)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Bendu Doeway, Claimant, filed an appeal from the December 31, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with Broadlawns Medical Center due to excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on January 24, 2019 at 2:00 p.m. Claimant participated. Employer participated through Julie Kilgore, Vice President of Human Resources and Heidi Garton, Nursing Director. No exhibits were admitted.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a healthcare technician from July 23, 2018 until her employment with Broadlawns Medical Center ended on December 3, 2018. (Garton Testimony)

Employer's attendance policy states that employees can have no more than five unscheduled absences. (Garton Testimony) The policy also requires employees to notify employer of any absences at least two hours prior to their shift. (Garton Testimony) These policies are included in the employee handbook; claimant received a copy of the handbook and acknowledged receipt on July 22, 2018. (Garton Testimony) Claimant was aware of the attendance policy. (Claimant Testimony) The handbook also states that violations of the attendance policy may be disciplined up to and including termination. (Garton Testimony)

On December 1, 2018, claimant notified employer that she would be absent from work due to car trouble. (Claimant Testimony) On November 10, 2018, claimant did not attend work and did not provide notice of her absence to employer prior to her shift. (Garton Testimony) On October 24, 2018, claimant was absent from work due to illness and notified employer at least two hours prior to the start of her shift. (Garton Testimony) On October 20, 2018, claimant was absent from work for one hour and 15 minutes, but is only allowed a 30 minute lunch break. (Garton Testimony) On September 21, 2018, claimant left early from work for a personal reason after notifying her supervisor. (Garton Testimony) On August 30, 2018, claimant left

early from work due to illness after notifying her supervisor. (Garton Testimony) On August 6, 2018, claimant left work early due to illness after notifying employer. (Garton Testimony)

On October 1, 2018, claimant was given a written warning regarding her attendance. (Garton Testimony) The warning stated that further unexcused absences may lead to claimant's termination. (Garton Testimony) Claimant signed the written warning on October 1, 2018. (Garton Testimony) Employer's attendance policy was also reviewed with claimant at this time. (Garton Testimony)

On December 3, 2018, employer offered claimant the option of resigning or being terminated due to absenteeism. (Garton Testimony) Claimant signed a voluntary resignation statement. (Garton Testimony) Claimant admitted that she did not recall whether she worked on specific dates or the reason for some absences. (Claimant Testimony) Claimant further testified that she did not believe her job was in jeopardy. (Claimant Testimony)

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*:

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 Admin. Code r. 871-24.32(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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(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.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191.

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. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 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).

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's version of events to be more credible than the claimant's version of those events. Employer was able to provide detailed information regarding the dates of and excuses for claimant's absences; claimant admitted to not recalling the dates of her absences and the reason for some absences. Claimant also testified that she did not believe her job was in jeopardy; however, claimant acknowledged receipt of a written warning that stated further unexcused absences may lead to termination of her employment.

Claimant's absence on December 1, 2018 is unexcused because it was transportation issues, which are not reasonable grounds. Claimant's absence on November 10, 2018 is unexcused because it was not properly reported and no reason was provided. Claimant's absence on October 20, 2018 is unexcused because it was not properly reported. Claimant's absence on September 21, 2018 is unexcused because it was personal reasons, which are not reasonable grounds. Claimant's absences on August 6, 2018 and August 30, 2018 are excused because they were properly reported and due to illness, which is a reasonable ground. Claimant accrued four unexcused absences during less than six months of employment. Three of the unexcused absences were accrued after claimant received a written warning regarding her attendance. Claimant's unexcused absenteeism was excessive and constitutes job-related misconduct. Claimant is disqualified for benefits.

DECISION:

The December 31, 2018 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/rvs