

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CANDISE ROBINSON
Claimant

GREENSTATE CREDIT UNION
Employer

APPEAL 21A-UI-15093-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/11/21
Claimant: Appellant (2)

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 28, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the finding she was excessively absent. The parties were properly notified of the hearing. A telephone hearing was held on August 26, 2021. The claimant participated. The employer participated through Human Resources Manager Sarah Farnsworth. Exhibits 1, 2, 3, 4, 5, and A were received into the record.

ISSUE:

Whether the claimant's separation is 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 member assistance specialist 1 from September 24, 2018, until this employment ended on April 13, 2021, when she was terminated. The claimant's immediate supervisor was Member Assistance Center Service Supervisor Susan Thompson.

In general, the claimant worked a set schedule from 8:30 a.m. to 5:30 p.m. Monday through Friday. Occasionally, the claimant would work on a rotating Saturday that would change her delay start times during the week.

The employer has an attendance policy that is described in its employee handbook. It generally states that an employee must notify their supervisor prior to the start of their shift. Individual departments within the employer's organization were given discretion to specify how much advanced notice a supervisor needed for an anticipated absence. In the claimant's department, an employee was supposed to inform their supervisor by 7:30 a.m. or an hour before a delayed start time. Attendance incidents were tracked via progressive discipline, but the organization retained discretion regarding when specifically to issue each step.

Prior to the final incident, the claimant had received disciplinary notices on regarding attendance and other forms of misconduct. The employer provided copies of these disciplinary warnings. (Exhibits 1 – 4) These disciplinary warnings and the conduct that gave rise to them are not described in greater detail because these circumstances do not change the outcome of the decision.

On October 19, 2020, the claimant was approved for Family Medical Leave Act leave regarding recurrent migraines she has received from Human Resources / Benefits Specialist Marianne Goschke. The claimant provided a copy of Ms. Goschke's email approving her to take leave up to one to four times per week. (Exhibit A)

The claimant received a final written warning regarding attendance on April 5, 2021. The employer provided a copy of this final warning. (Exhibit 5) This final written warning stated in pertinent part, "Any further incidents including, but not limited to, the issues noted above may result in further disciplinary action, up to and including termination from employment." (Exhibit 5) During the meeting regarding this incident, Human Resources Manager Farnsworth and Ms. Thompson also stressed that additional absences could result in termination.

On April 12, 2021, the claimant woke up at 7:27 a.m. to the symptoms of the recurrent migraine that led her to be approved for FMLA. At that time, the claimant called Ms. Thompson and left a voicemail stating that she was not going to be in that day because she was ill with the migraine. The claimant then sent a group chat message to Member Assistance Center Service Supervisor Sierra Woodall and Ms. Thompson at 7:44 a.m. that same day. The text message said she had left a voicemail for Ms. Thompson and would be in on that day.

On April 13, 2021, Vice President of Member Assistance Center Services Amy Stevens and Ms. Farnsworth terminated the claimant because of this attendance incident. On that day, the claimant attempted to show that she had left a voicemail for Ms. Thompson at 7:27 a.m. Nevertheless the claimant was terminated.

During the hearing, Ms. Farnsworth stressed that a delay in 14 minutes from 7:30 a.m. to 7:44 was burdensome on supervisors who would have to rearrange the extraordinary call volume prior to the phones being attended to at 9:00 a.m. that day. The claimant came to just the opposite conclusion reasoning that there should have been ample time to make those changes.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct.

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) and (8) provide:

(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.

(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.

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).

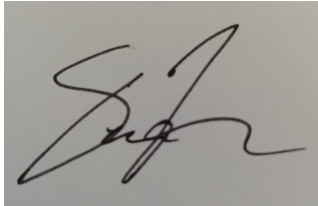
An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work.

The administrative law judge finds the claimant properly reported her absence on April 12, 2021 and justified that absence due to her own illness. As such, the final incident is not disqualifying misconduct under Iowa Admin. Code r. 871-24.32(7). Since the final incident is not misconduct, the employer only has past acts to justify its termination decision which does not satisfy the rule expressed in Iowa Admin. Code r. 871-24.32(8) that disqualifying misconduct can only be for a current act.

While Ms. Farnsworth maintains that the claimant did not call in according to the employer’s procedures, the administrative law judge found otherwise based on the claimant’s first-hand knowledge and experience of sending these messages. Even if the administrative law judge had found that she had not left a voicemail at 7:27 a.m., he would have found in the claimant’s favor because 45 minutes of advanced notice is proper notice. While an employer can discharge an employee for failing to provide whatever duration of advanced notice it wants, this does not make it disqualifying for the purposes of unemployment.

DECISION:

The June 28, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was terminated for no disqualifying reason. Benefits are granted, provided she is otherwise eligible.

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

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Des Moines, Iowa 50319-0209
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August 30, 2021
Decision Dated and Mailed

smn/kmj