

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**CORY KERR**  
Claimant

**CASEY'S MARKETING COMPANY**  
Employer

**APPEAL 20A-UI-09249-BH-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/08/20**  
**Claimant: Appellant (2)**

Iowa Code section 96.5(1) – Voluntary Quit  
Iowa Administrative Code rule 871-24.25 – Voluntary Quit Without Good Cause  
Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Administrative Code rule 871-24.32(1)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Cory Kerr appealed the April 6, 2020 (reference 01) unemployment insurance decision that denied benefits. The agency properly notified the parties of the hearing. The undersigned presided over a telephone hearing on September 18, 2020. Kerr participated personally and testified. Casey's Marketing Company (Casey's) did not participate.

**ISSUE:**

Was Kerr's separation from employment with Casey's a layoff, discharge for misconduct, or voluntary quit without good cause attributable to the employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the undersigned finds the following facts.

Casey's hired Kerr in or around October of 2019. Kerr worked full time as an overnight clerk, cook, and baker. Casey's discharged Kerr on March 27, 2020.

Kerr's immediate supervisor was Anita Fowler. Kerr and Fowler were in a romantic relationship. The two lived together. Fowler would give Kerr a ride to work in her vehicle, then Kerr would walk the six miles home after his shift ended.

Kerr was scheduled to work a shift on March 27, 2020. Fowler left him at home a couple of hours before the scheduled start time of his shift. She did not return to give him a ride to work. Kerr was unable to make alternative arrangements for transportation to work because he had

unintentionally left his mobile phone in the car of an Uber driver who lived in Ames, Iowa, and had not yet gotten his phone back.

Later that day, Fowler informed Kerr that he was done at Casey's and had to find another place to live. Kerr attempted to contact Fowler after this conversation to see if he still had a job. But Fowler did not accept or return his phone calls. Kerr does not know why Fowler discharged him.

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

For the reasons that follow, the administrative law judge concludes Casey's discharged Kerr from employment for no disqualifying reason.

In appeals such as this one, the issue is not whether the employer made a correct decision in discharging 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).

Under Iowa Code section 96.5(2)(a), an individual is disqualified for benefits if the employer discharges the individual for misconduct in connection with the individual's employment. The statute does not define "misconduct." But Iowa Administrative Code rule 871-24.32(1)(a) does:

"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.

The Iowa Supreme Court has ruled this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Administrative Code rule 871-24.32(4) states:

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.

Casey's did not participate in the appeal hearing. Consequently, Casey's presented no evidence relating to the reason why Fowler discharged Kerr. It would be inappropriate for the undersigned

to speculate as the reason why Fowler discharged Kerr. Casey's has therefore failed to meet its burden to prove disqualifying misconduct.

Further, even if the undersigned assumes for the sake of argument that Fowler discharged Kerr because he missed his shift, it is not misconduct under Iowa law. Iowa Administrative Code rule 871-24.32(7) provides:

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.

And rule 871-24.32(8) states:

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. 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.

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. 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. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Excessive absenteeism has been found when there have 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).

The evidence establishes Kerr had made an arrangement with Fowler for a ride to work. He would then walk home from work at the end of his shift. Thus, Kerr missed his shift because of the actions of his immediate supervisor, Fowler, not because of any bad act on his part. Missing

work because one's immediate supervisor fails to fulfill her responsibilities under an arrangement to give one a ride to work is reasonable. Moreover, one absence is not excessive as a matter of law. For these reasons, Kerr's absence is excused and not excessive under Iowa law.

For these reasons, Casey's has failed to meet its burden to prove it discharged Kerr for misconduct. The evidence is insufficient to establish Casey's discharged Kerr for misconduct. Rather, the record shows it is more likely than not Casey's discharged Kerr for no disqualifying reason under Iowa law. Benefits are allowed.

**DECISION:**

The April 6, 2020 (reference 01) unemployment insurance decision is reversed. Casey's discharged Kerr from employment for no disqualifying reason. Benefits are allowed, provided Kerr is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

A handwritten signature in black ink, appearing to read "Ben Humphrey", with a stylized flourish extending from the end.

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Ben Humphrey  
Administrative Law Judge

September 22, 2020  
Decision Dated and Mailed

bh/scn