

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CYNTHIA S KRESS
Claimant

NIM TRANSPORTATION LLC
Employer

APPEAL 22A-UI-06208-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/10/21
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:

Claimant, Cynthia S. Kress, appealed the March 1, 2022 (reference 05) initial decision, which denied benefits based upon her separation with this employer. After proper notice, a telephone hearing was held on April 21, 2022. Claimant participated personally. Employer/respondent, Nim Transportation LLC., participated through Katina McDaniel, Human Resources Manager. David Steen, Administrative Law Judge, attended as an observer. No exhibits were offered or admitted. Official notice was taken of the administrative record. 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.

NOTE TO EMPLOYER:

If you wish to change the address of record, please access your account at:
<https://www.myiowaui.org/UITIPTaxWeb/>.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence and administrative records, the administrative law judge finds: Claimant began employment on January 10, 2022, and worked until February 2, 2022 as a full-time receptionist. Claimant was discharged on February 4, 2022 for violating the employer's attendance policy.

Claimant was trained on the employer's attendance policy prior to beginning work, and again on January 14, 2022. Employer utilized a point based system that assessed "points" for attendance infractions. A new employee, such as claimant, was subject to discharge upon incurring five points in her first sixty days of employment. The policy was a no fault policy, meaning attendance points would be assessed regardless of reason. Claimant was expected to notify Ms. McDaniel of an absence 24 four hours prior to her shift, if she was unable to perform work.

Employer discharged claimant based upon three incidents: On January 14, 2022, claimant was absent the full day due to caring for her granddaughter, who needed to go to the doctor. Claimant's granddaughter lives with her. Employer met with claimant after this absence and resent the attendance policy as review. Claimant incurred two points for the absence. Claimant was absent on February 3, 2022 due to a migraine headache. She notified the employer prior to her shift start time, and incurred two more points. The final incident occurred on February 4, 2022 when claimant was absent due to a stomachache. Claimant notified her manager prior to her shift start time. The undisputed evidence is claimant had no written warnings prior to discharge. She was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged but not for disqualifying job-related misconduct. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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.

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").

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).

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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and 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.

Claimant in this case took reasonable steps to properly report her final absence on February 4, 2022 due to illness. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp’t Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Therefore, the final absence was due to illness and properly reported, would be considered excused.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. (Claimant is not currently eligible for benefits due to Appeal 22A-UI-06205-JC-T.)

Nothing in this decision should be interpreted as a condemnation of the employer’s right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant’s conduct leading separation was misconduct under Iowa law.

DECISION:

The March 1, 2022 (reference 05) initial decision is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Jennifer L. Beckman

Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

April 26, 2022
Decision Dated and Mailed

jlb/mh

NOTE TO CLAIMANT:

You may find information about food, housing, and other resources at <https://covidrecoveryiowa.org/> or at <https://dhs.iowa.gov/node/3250>

Iowa Finance Authority also has additional resources at <https://www.iowafinance.com/about/covid-19-ifa-recovery-assistance/>