

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SHAUNTEL D NEGRETE
Claimant

ASAP APPLIANCE
Employer

APPEAL 16A-UI-12028-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/09/16
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 November 3, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on November 28, 2016. The claimant participated personally. The employer did not register a phone number with the Appeals Bureau and did not participate. Claimant exhibit A was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

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 sales manager and was separated from employment on October 7, 2016, when she was discharged.

When the claimant was hired, she received access to the company handbook and policies (Claimant exhibit A). The employer's call off policy for absences requires an employee text or call at least thirty minutes prior to their shift start time (Claimant exhibit A) and that "when a team member's attendance becomes excessive and harmful to the business, the supervisor will notify/counsel the team member regarding their attendance record." (Claimant exhibit A). The claimant had no prior warnings for any reason, and was unaware her job was in jeopardy.

The claimant last performed work on October 6, 2016. That evening she became ill with a migraine like headache which carried over to the next morning. The claimant was scheduled to start her shift at 8:30 a.m. and at 7:07 a.m. text messaged her manager that she would be absent (Claimant exhibit A). The claimant did not elaborate why in the next message. At 7:17 a.m., the claimant received a text message from her manager, Mr. Gomez, that appeared to be

part of a group text. The message read “sorry guys this is ridiculous. Your all fired.” (sic) (Claimant exhibit A). The claimant did not obtain a doctor’s note to present to the employer because she was discharged 10 minutes after reporting her absence which was attributed to a migraine headache.

The employer did not attend the hearing and did not furnish any written statement in lieu of participation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not 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:

871—24.32 Discharge for misconduct.

24.32(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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, 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 believable evidence; 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.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has failed to meet its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism, the administrative code provides:

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"). The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In this case at hand, the claimant had a single absence related to illness, specifically, a migraine. The claimant properly reported the absence when she text messaged Mr. Gomez over thirty minutes in advance of her 8:30 a.m. shift on October 7, 2016 (Claimant exhibit A). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper, supra*. 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 claimant's absence on October 7, 2016, would be considered excused for unemployment insurance benefits purposes.

The employer did not attend the hearing and refute the claimant's credible testimony. Based on the evidence presented, the claimant had a single absence, due to illness, when she properly called off on October 7, 2016. Based on the proper notification and reason for the absence, it would be considered excused for purposes of unemployment insurance eligibility. The claimant had no other absences during her employment. Therefore, the employer has failed to establish that the claimant had excessive unexcused absences or engaged in any conduct which would rise to the level of misconduct. Accordingly, benefits are allowed.

DECISION:

The November 3, 2016, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs