

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JACLYN L BROWN
Claimant

ABCM CORPORATION
Employer

APPEAL 17A-UI-04022-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/12/17
Claimant: Appellant (1)

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 April 7, 2017, (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 5, 2017. The claimant participated personally. The employer participated through Amanda Back, human resources coordinator. Employer Exhibits 1 through 8 were admitted 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.

ISSUES:

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 part-time as a developmental aide and was separated from employment on March 15, 2017, when she was discharged.

The claimant began employment December 8, 2016 as a dietary aide. She voluntarily requested a transfer to developmental aide, which became effective March 1, 2017. Prior to transferring to the developmental aide position on March 1, 2017, the claimant had been warned on January 3, 2017, February 20, 2017, and February 27, 2017 (Employer Exhibit 5-7), for 6 tardies, which the claimant attributed to childcare issues. When the claimant was hired, she was trained and received access to the employer policies, including attendance (Employer Exhibit 8). The employer's policy specifically states "No call/no show is automatically an absence. Because of the severe impact of absences without appropriate notice, these are tracked on a twelve month look back period. Three within twelve months will result in automatic termination."

On March 7, 2017 after her shift ended, the claimant called the employer to report she would be absent for her March 8, 2017 shift due to the father of her child being hospitalized (Employer

Exhibit 3). The employer records all absences on “yellow sheets” because they are a round-the-clock nursing home, and constantly tracking staffing needs. According to the claimant, she was told by Ms. Schultz, (who handled the call) that she needed to call in daily. The claimant stated she was told covering her shift was unnecessary due to her being in training. She also said she told Ms. Schultz it would be a few days. The claimant stated she called the employer before her shifts on March 9, 11 and 12. The claimant could not recall who she spoke to and presented no phone records confirming times of calls made to the facility. The employer had no records of the claimant calling for those shifts.

The claimant then called the employer on March 14, 2017, ten minutes before her shift, to report her absence (Employer Exhibit 3). Michelle Moore called the claimant to discuss her job status because the claimant had missed training (Employer Exhibit 4) and had failed to update the employer of her status. Ms. Moore asked the claimant to think about whether she wanted to continue working and let Ms. Moore know (Employer Exhibit 4). The claimant did not respond to Ms. Moore's request, and did not report her absence on March 15, 2017. Ms. Back called the claimant after her fourth no call/no show, and discharged her.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was 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:

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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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).

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 witnesses 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 satisfied 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:
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").

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). The administrative law judge is persuaded the claimant was aware of the employer's policies, which required supporting documentation or sufficient information to support excusing an absence related to worker's compensation or personal illness. The administrative law judge would note that for purposes of unemployment eligibility, "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).

In this case, the claimant had a history of attendance infractions including six tardies in her first three months of employment, which resulted in three documented warnings on January 3, 2017, February 20, 2017, and February 27, 2017 (Employer Exhibit 5-7), as a result of childcare

issues. The claimant then properly reported her absence for March 8, 2017, when she called the day before and spoke to the employer. The administrative law judge is sympathetic to the stress the claimant may have had with the father of her child being hospitalized. The administrative law judge however, is not persuaded that the claimant's calling on March 7, 2017, to state her child's father was in the hospital was sufficient to also cover properly reporting her absences on March 9, 11, and 12. Based on the vague, non-specific testimony offered by the claimant and lack of documentation by the employer, the evidence does not support the absences were properly reported. The claimant did properly report her absence for March 14, 2017 and was informed she needed to let the employer know if she intended to continue employment based on her repeated absences and the claimant did not. She was then again a no call/no show on March 15, 2017, thereby establishing she had 4 no call/no shows within a twelve month period, beyond the three referenced in the employer's policy. Without even addressing the issue of whether the reason for which the claimant missed work should be considered excused (regardless of the employer's policy definition of an excused absence), the administrative law judge concludes the claimant did not properly report her absences on March 9, 11, 12 and 15 and therefore they cannot be considered excused.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The April 7, 2017, (reference 03) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs