

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RENEE ANDERSON,
Claimant

LUND MFG. COMPANY, INC.
Employer

**APPEAL 21A-UI-00035
Case No. 21IWDUI0197
ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 9/20/20
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On November 28, 2020, Claimant Renee Anderson filed an appeal from the November 23, 2020 (reference 01) unemployment insurance decision that determined she was not eligible to receive unemployment insurance benefits because she was discharged for repeated tardiness after being warned. A telephone hearing was held on February 25, 2021. The parties were properly notified of the hearing. Employer failed to appear at or otherwise participate in the hearing. Claimant Renee Anderson did appear and testify at the hearing. Official notice was taken of the administrative file that was supplied along with this case.

ISSUE(S):

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Claimant began her employment with Lund on November 5, 2018, as a CNC operator. She later started working as a die caster on the second shift, which ran from 2:45 p.m. to 11:00 p.m. Lund's plant manager was Donna Sieverding. In the days and weeks leading up to Friday, August 28, 2020, Claimant had been experiencing many work-related health conditions and was dealing with pain. Accordingly, she had been placed on light duty work. Then, on Sunday, August 30, 2020, the pain became so great that she went to the hospital. While at the hospital, she was given a COVID test.

So, on Monday morning, Claimant called in to her supervisor and reported that she had taken a COVID test and that she would be off work until that result came back. Her supervisor understood this and acknowledged that she would be off until Wednesday at least.

Claimant's test came back negative on Wednesday, so she called in to the plant manager to report it. However, she was still experiencing a great deal of pain and could not even walk due to her work-related injuries. Due to this, she reported that she could not work on Thursday.

On Friday, September 4, 2020, Lund representative Dennis Tressel called Claimant and gave her a formal separation speech, saying simply "we are just going to separate." No further details were provided as to why she was being terminated.

According to Claimant, prior to that time she had indeed had some absences and tardies, but they were all related to either injuries or treatment for those injuries. And, she always reported those occasions ahead of time. Lund was OK with this, and accepted it. If she had to be late to work, she would always work late that day.

Claimant was aware that Lund had a policy providing that if an employee is absent for three days in a row without calling in, it is considered an abandonment of the job. However, she never had three such days in a row.

On September 20, 2020, Claimant filed a claim for unemployment. Following a phone interview with an IWD representative, that representative denied benefits, finding that Claimant had been discharged from work for "repeated tardiness in reporting for work after being warned."

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the November 23, 2020 (reference 01) unemployment insurance decision that found claimant not eligible is reversed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 provides in relevant part:

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) 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.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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).

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).

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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit, supra*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *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.

As noted, the Employer did not appear for this hearing and offered no evidence or testimony. As such, the undersigned relied solely on the administrative record and the testimony of claimant. For reasons that will follow, I conclude Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). First, the claimant seemed to be a credible person on the hearing. Her demeanor and recall of important events were such that I did not sense that she was lying or shading the truth. Second, as just noted, the Employer offered no evidence at this hearing. As the party with the burden of proof, the employer’s case must be well supported and convincing.

Again, based on the record here, I can conclude there were some absences and instances tardiness. However, according to Claimant’s credible testimony, whenever she was late or absent it was always due to a health issue and she always reported this to her supervisor ahead of time. While there does appear to be a work policy regarding successive unreported absences, there is no evidence that Claimant violated this rule. Furthermore, according to Claimant, she was never informed of the reason for why she had to be separated.

All of this leads to the conclusion that there were not excessive unexcused instances of tardiness such that they would be considered to be deliberate, intentional, or culpable acts against the interest of the employer. As such, the employer has not met its burden of proof to establish misconduct. The record does not support that the claimant was discharged for any disqualifying reason.

DECISION:

The November 23, 2020, 2019 (reference 01) unemployment insurance decision is REVERSED. Claimant is eligible to receive benefits. Any benefits claimed and withheld on this basis shall be paid.



David Lindgren
Administrative Law Judge
Department of Inspections and Appeals
Administrative Hearings Division
Fax (515) 281-7148

February 26, 2021

Decision Dated and Mailed

cc: Renee Anderson (by first class mail)
Lund Mfg. Company, Inc. (by first class mail)
Nicole Merrill, IWD (email)
Joni Benson, IWD (email)