

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JOYCE I LESLIE
Claimant

APPEAL NO. 12A-UI-04006-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 03/18/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the April 9, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on May 2, 2012. Claimant participated. Employer participated through Store Director Amy Jordahl and Perishables Manager Brandon Utz and was represented by Anna Marie Gonzalez of Corporate Cost Control, Inc.

ISSUE:

Did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a deli clerk and was separated from employment on March 18, 2012. She was scheduled 5 a.m. to 1 p.m. and called in sick because her daughter hit her in the eye the night before and she could not see and was having trouble walking. She did not see a doctor, but her daughter was arrested. Claimant came in at 1:30 p.m. to sell beer on a half-hour shift at Hy-Vee for her part-time beer distributor employer with help from her husband. She did not know how to reach that employer to let them know she was unable to work. Utz spoke with her when she arrived and observed her eye was red as if she had been hit. He knew she had called in other times to report absences because of domestic abuse. The employer did not document warnings about attendance, but claimant was aware the employer was concerned about her attendance. Utz told her he needed someone reliable, she had too many family issues, and she was fired.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

871 IAC 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.

Excessive and unexcused absenteeism can constitute misconduct. Iowa Admin. Code r. 871-24.32(7). The employer has the burden of proof in establishing disqualifying job misconduct. 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 Department of Job Service*, 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

Although there might generally be a concern about credibility when an employee calls in sick for one employer yet works for another employer later the same day, claimant's shift for the second employer was only a half-hour, she had her husband's help with the work, and she did not know how to reach that supervisor. The employer has not established claimant had excessive absences that would be considered unexcused for purposes of unemployment insurance eligibility. Since her most recent absence was related to a properly reported domestic abuse injury, no final or current incident of unexcused absenteeism occurred that establishes work-connected misconduct and no disqualification is imposed.

DECISION:

The April 9, 2012 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw