

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SARAH L WEBER
Claimant

CORKERY TRANSPORT INC
Employer

APPEAL 23A-UI-08577-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/06/23
Claimant: Respondent (4)

Iowa Code § 96.5(2)a – Discharge from Employment

STATEMENT OF THE CASE:

On September 7, 2023, employer Corkery Transport Inc. filed an appeal from the August 28, 2023 (reference 01) unemployment insurance decision that allowed benefits after claimant Sarah L. Weber's separation from employment. The parties were properly notified of the hearing. A telephonic hearing was held at 10:00 a.m. on Tuesday, September 26, 2023. Claimant Sarah L. Weber participated. Employer Corkery Transport Inc. participated through company president Ross Corkery. No exhibits were offered or admitted into the record. The administrative law judge took official notice of the administrative record.

ISSUES:

Whether the claimant's separation is a disqualifying discharge due to excessive, unexcused absenteeism?

Whether claimant is able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for this employer on April 18, 2022. Most recently, she worked full-time hours as a customer service representative. Claimant's employment ended on August 8, 2023, when the employer discharged her due to her absenteeism.

Claimant had been struggling with her attendance since her diagnosis of type 2 diabetes in late January/early February 2023. As she learned how to regulate her blood sugar, with its dips and spikes, she experienced side effects including headaches and dizziness. Claimant's doctors were trying to regulate her condition without sending her to a specialist, which was not leading to medical success and which was causing additional absences. Additionally, claimant acquired both a severe sinus infection and a staph infection in July 2023, which led to her missing a significant amount of work.

Claimant was absent from work almost the entire month of July 2023 due to personal illness. She would either miss full days of work or she would report to work and then leave after an hour or two due to one or more personal illnesses. This pattern continued into August 2023. On August 1, claimant called in sick. On August 2, claimant worked for one hour and 40 minutes. She then was absent for the remainder of the day due to low blood sugar. This same day, claimant experienced what appeared to be a diabetic coma. She sent Corkery an email that just read: "Help." Corkery found claimant in her office unresponsive.

On August 3, claimant was absent for the entire day. Corkery did not record a reason for that absence. On August 4, claimant was supposed to take a one-hour lunch break, but her lunch ended up lasting two hours. Claimant reported that she was delayed due to picking up medication. Claimant's final absence occurred on August 7, 2023. She came to work and reported that she had to leave early that day because her husband had scheduled a doctor's appointment for her related to her type 2 diabetes diagnosis. Corkery discharged claimant the following day.

Claimant's doctors referred her to an endocrinologist who found appropriate medication for her sometime between August 15 and August 20. After claimant was on proper medication, her type 2 diabetes has been well-regulated.

The administrative record shows claimant did not begin reporting reemployment activities in IowaWorks until the benefit week ending August 26, 2023.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,060.00, since filing a claim with an effective date of August 6, 2023, for the six weeks ending September 16, 2023. The administrative record also establishes that the employer did participate in the fact-finding interview. Corkery personally participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. However, claimant was not able to and available for work for the two-week period ending August 19, 2023. Benefits are denied for those two weeks. Thereafter, benefits are allowed.

The first issue is whether claimant was discharged due to disqualifying excessive, unexcused absenteeism. Iowa Code section 96.5(2)(a) and (d)(9) provide:

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 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.

...

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(9) Excessive unexcused tardiness or absenteeism.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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 has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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).

The employer must prove two elements to establish misconduct based on absenteeism. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When a claimant does not provide an excuse for an absence, the absence is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Here, the parties agree that claimant’s final absence was due to her ongoing medical issue. Claimant properly reported this to the employer by notifying Corkery when she arrived at work, giving him as much advance notice as she had of the appointment. The administrative law judge is sympathetic to the employer’s frustration with the employee’s ongoing absence from work and with the difficulty of employing someone who appears to be neglecting their healthcare and bringing their precarious health condition into the workplace. However, claimant’s final absence was a properly-reported absence for personal medical reasons. Therefore, the employer has not established the discharge was based on a final, current act of disqualifying misconduct. The history of prior absences will not be analyzed. Benefits are allowed based on claimant’s separation.

The next issue is whether claimant is able to work and available for work. Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

- (1) An individual who is ill and presently not able to perform work due to illness.

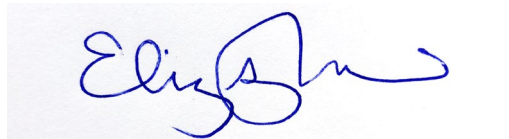
For an unemployed individual to be eligible to receive benefits, she must be able to work, available for work, and actively seeking work as required by the unemployment insurance law. Iowa Code § 96.4(3). The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. Iowa Code § 96.6(2); Iowa Admin. Code r. 871-24.22. In this case, claimant saw an endocrinologist for her type 2 diabetes sometime between August 15 and August 20, 2023. Once she saw the endocrinologist and had her medication adjusted, claimant's blood sugar became well-regulated and claimant was ready to work full-time hours without frequent interruption. The administrative law judge finds claimant was able to work effective August 20, 2023. Accordingly, benefits are withheld for the two-week period between August 6, 2023 and August 19, 2023.

This matter will be remanded for the Benefits Bureau to issue an overpayment decision consistent with the two-week denial.

DECISION:

The August 28, 2023 (reference 01) unemployment insurance decision is modified in favor of the employer/appellant. Claimant was discharged from employment for no disqualifying reason. However, claimant was not eligible for benefits for the two-week period between August 6, 2023 and August 19, 2023 because she was not able to work. Benefits are allowed effective August 20, 2023, provided she is otherwise eligible.

REMAND: This matter is remanded to the IWD Benefits Bureau to calculate claimant's overpayment based on the two-week denial and to issue an overpayment decision.



Elizabeth A. Johnson
Administrative Law Judge

September 28, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.