

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHY SIMONTON
Claimant

CATERING DSM LLC
Employer

APPEAL 19R-UI-08727-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/18/19
Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Catering DSM (employer) appealed a representative's September 5, 2019 decision (reference 01) that concluded Kathy Simonton (claimant) was discharged and there was no evidence of willful or deliberate misconduct. This administrative law judge issued a decision on October 7, 2019, affirming the representative's decision. A decision of remand was issued by the Employment Appeal Board on November 4, 2019. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 4, 2019. The claimant participated personally. The employer participated by Alex Jimenez, Director of Catering and Events, and Sarah Burt, Catering and Events Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 4, 2018, as a part-time catering server working twice a month. She signed for receipt of the employer's handbook on October 4, 2018. The handbook indicated she was to notify a supervisor an hour prior to the start of her shift if she were to be absent. The employer did not issue the claimant any warnings during her employment.

On February 21, 2019, the claimant had to leave work early because her son was taken to the hospital. She gave the employer notice that she had to leave work but did not have time to arrange for a replacement. Her adult son had medical issues after having a previous traumatic brain injury.

The claimant's mother was diagnosed with Alzheimer's and could not be left alone. The claimant's father was her caretaker. On March 29, 2019, the claimant's father passed away. On June 1, 2019, the claimant moved to Montezuma, Iowa, to live with her mother, who could not be left alone. Another family member helped the claimant.

On June 5, 2019, the claimant was absent to attend a funeral. She found a replacement to work for her. The claimant reported the absence to the supervisor and to her co-workers in one e-mail. The employer wanted the claimant to send two different e-mails. On June 11, 2019, the claimant properly reported her absence when her son was admitted to the hospital. She found a replacement to work for her.

On or about July 1, 2019, the claimant worked her last day. On July 8, 2019, the claimant reported her absence to the supervisor and to her co-workers in one e-mail. She was absent because she did not have anyone to stay with her mother. The claimant found a replacement worker for her shift.

On August 10, 2019, the claimant's son was unexpectedly admitted to the hospital. She found out about the situation as she was driving to work and notified the employer of her absence immediately. On August 16, 2019, the employer sent the claimant an e-mail. It terminated the claimant due to "inconsistencies of shift commitment and communicating within the appropriate amount of time".

The claimant filed for unemployment insurance benefits with an effective date of August 18, 2019. She did not receive any unemployment insurance benefits after her separation from employment. The employer did not participate personally in the fact-finding interview on September 4, 2019. It provided some documents for the fact finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

Three incidents of absence, including the final absence, were when the claimant's child was in the hospital. These absences do not amount to job misconduct because they were properly reported or reported to the best of the claimant's ability. One cannot report an incident until the incident is known. The claimant's absence when her son was in the hospital cannot be considered misconduct. A parent's presence when their child is admitted into the hospital has no wrongful intent. This leaves two absences in eight months. The claimant attended a funeral and took care of her mother. In both instances, she found a replacement worker. The employer did not provide sufficient evidence to meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 5, 2019, decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn