

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HAYLEY FRASCHT
Claimant

BWW RESOURCES LLC
Employer

APPEAL 21A-UI-03949-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/15/20
Claimant: Appellant (2)

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 January 22, 2021, (reference 03) unemployment insurance decision that denied benefits based upon the conclusion she was excessively absent. The parties were properly notified of the hearing. A telephone hearing was held on April 1, 2021. The claimant participated. The employer did not participate. The administrative law judge took official notice of the agency records. Exhibit A was admitted into the record.

ISSUE:

Whether the claimant's separation disqualified her from benefits?

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 cashier / service assistant from June 2020, until this employment ended on July 19, 2020, when she was terminated. The claimant's immediate supervisor was Assistant Manager Hope Eldridge.

The employer has an attendance policy which is outlined in its employee manual. The attendance policy requires employees to call the store and report that they will not be present at work four hours prior to their shift beginning. The attendance policy states an employee receives a verbal warning after one unexcused absence, a written warning after two unexcused absences and is terminated after three unexcused absences. The claimant received a copy of the employee handbook when she was hired.

In mid-July 2020, the claimant informed General Manager Rich (last name unknown) that she was going to the doctor for an ultrasound regarding her pregnancy at 11:00 a.m. on July 18, 2020. She told Rich that she was not sure if she would be able to report to her shift at 5:00 p.m. that day if there were complications discovered during the procedure. Rich told the claimant he understood.

On July 18, 2020, the claimant went to the doctor as scheduled. During the procedure, the claimant's medical provider informed her that her baby did not have a heartbeat and was a miscarriage. The procedure concluded at 11:44 a.m. The claimant provided a copy of her discharge notes from the procedure. (Exhibit A) The claimant was scheduled to have an emergency surgery on the following Monday, July 20, 2020. The claimant was emotionally devastated by the news and could not work that day. Furthermore, the claimant's medical provider instructed her to rest until the surgery. With that in mind, the claimant called the store to inform staff she would not be present for her shift at 5:00 p.m. later that day. After being placed on hold for approximately 20 minutes, Ms. Eldridge picked up the phone. The claimant was only able to say, "Hey this is Hayley," before Ms. Eldridge hung up the phone. The claimant attempted to call the store back, but she could not get a connection.

On July 19, 2020, Ms. Eldridge terminated the claimant's employment based on the conclusion the claimant did not report for work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from for a non-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.

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(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.

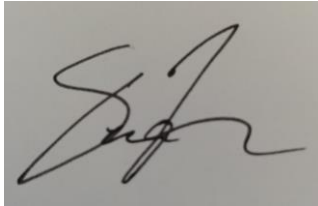
Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "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 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* at 192. Second, the absences must be unexcused. *Cosper* 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* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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).

The claimant was terminated for not reporting to work on July 18, 2020. The claimant previously excused her absence on this day with Rich. The claimant also called in to work on July 18, 2020 with a medical excuse. Furthermore, the claimant had never been warned about attendance in the past. Given these observations, it cannot be logically argued she engaged in excessive absenteeism. Benefits are granted.

DECISION:

The January 22, 2021, (reference 03) unemployment insurance decision is reversed. Claimant was discharged for a non-disqualifying reason. Benefits are granted provided she is otherwise eligible.

A handwritten signature in black ink, appearing to read 'S. Nelson', is shown within a rectangular frame.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
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April 6, 2021
Decision Dated and Mailed

smn/lj