

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY GREENE

Claimant

APPEAL NO: 13A-UI-05536-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARNER-BOCKEN COMPANY

Employer

OC: 04/14/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 6, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 18, 2013. The claimant participated in the hearing with her father/witness, William Greene. John Perrin, Director of Information Services and Lindsay Thooft, Support Desk Supervisor, participated in the hearing on behalf of the employer. Employer's Exhibits One through Six were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time support desk associate for Farner-Bocken Company from February 16, 2011 to April 18, 2013. She was discharged from employment due to a final incident of absenteeism that occurred on April 18, 2013.

The employer's attendance policy requires employees to call in six hours prior to their shift to avoid an unexcused absence (Employer's Exhibit One). Each full day occurrence results in four points and each incident of tardiness results in two points (Employer's Exhibit One). If an employee accumulates 18 points in a rolling 90-day period her employment is terminated (Employer's Exhibit One). Ten points result in a written warning (Employer's Exhibit One). The claimant's department does not follow the remainder of the employer's attendance disciplinary policy calling for a one-week suspension at 14 points (Employer's Exhibit One). The employer's policy states, "Management also retains the right to accelerate disciplinary action under this policy when deemed appropriate...Management reserves the right to amend or discontinue this policy at any time without notice" (Employer's Exhibit One).

On January 27, 2012, the claimant texted Support Desk Supervisor Lindsay Thooft at 5:30 a.m. to report she would not be at work that day (Employer's Exhibit Three). The claimant took her

father to his dialysis appointment that day. She learned the night before she would be taking him to dialysis but her brother borrowed her cell phone and her parents do not own cell phones so she could not text Ms. Thooft at that time and there was no one at work to call to report her absence at that time in the evening. The claimant received one occurrence and four points for her absence (Employer's Exhibit Three). On March 27, 2012, the claimant's father called in for her one hour after the scheduled start time of her shift (Employer's Exhibit Three). The claimant had strep throat, diagnosed at a clinic after work the previous day, but planned to go to work March 27, 2012, until she became dizzy and her father told her she could not go to work in that condition. She received one occurrence and four points for that absence (Employer's Exhibit Three). On July 17, 2012, the claimant called Ms. Thooft's cell phone two hours late for her scheduled shift and stated she would not be in (Employer's Exhibit Three). She received one occurrence and four points for that absence (Employer's Exhibit Three). On September 27, 2012, the claimant texted Ms. Thooft at 5:46 a.m. to state she would be late but failed to show up for work or call back (Employer's Exhibit Three). The claimant received one occurrence and four points for her absence (Employer's Exhibit Three). The claimant admits her absences July 17 and September 27, 2012, were not due to illness but rather attributable to "stupidity." On April 18, 2013, the claimant failed to call or report for her 6:30 a.m. shift and the employer tried to call her several times without success (Employer's Exhibit Three). The claimant called Ms. Thooft at 11:30 a.m. and her employment was terminated. The claimant overslept because she took Nyquil and Alka Seltzer as she had been up ill the night before and had not slept, causing her to oversleep.

The claimant received a written warning October 4, 2012, for her attendance and falling asleep at work and a written warning temporary modification of attendance rules November 1, 2012, stating she was on attendance probation and could not have another absence prior to May 1, 2013, without being subject to immediate dismissal (Employer's Exhibits Four and Five).

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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.

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 Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

In attendance cases, the question is whether the claimant’s absences are excessive. In this case the claimant accumulated five unexcused absences, in a period of 15 months. It is difficult to conclude five unexcused absences in that period of time are excessive. Additionally, while the employer used an attendance policy, the claimant’s department chose to disregard a portion of the stated disciplinary action and also reserved the right to accelerate disciplinary action under the policy when “deemed appropriate.” As an example the employer cites, “habitual offenders (someone who incurs several points in consecutive quarters or routinely calls in requesting the first or last day of the work week off) may trigger accelerated disciplinary action beyond what is prescribed herein, including termination” (Employer’s Exhibit One). While the employer accelerated the claimant’s disciplinary action, it did not demonstrate the claimant earned that level of disciplinary action.

Of course the employer is able to follow whatever policy it chooses and to terminate an employee for no reason at all if it likes. In this case the employer has not established excessive unexcused absenteeism on the part of the claimant as that term is defined by Iowa law. (Emphasis added). However, this decision should not lead the claimant to believe the administrative law judge was satisfied with many of her answers concerning why she was absent or failed to call in on time. Even though the employer did not meet its burden of proving disqualifying job misconduct by showing excessive unexcused absenteeism, the claimant needs to demonstrate more maturity with regard to her attendance. It is one thing to miss work when legitimately ill. It is quite another to miss work for “stupidity.” That fact did not go unnoticed by the administrative law judge. That said, however, benefits must be allowed.

DECISION:

The May 6, 2013, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css