

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CARLA B BOUTTE
Claimant

MARKETLINK INC
Employer

APPEAL 16A-UI-05957-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/08/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 25, 2016 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 14, 2016. Claimant participated. Employer participated through human resources Stephanie Ung and center manager Larry Schultz. Sales supervisor Dawn Ramirez attended the hearing on behalf of the employer, but did not testify.

ISSUE:

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a telephone sales agent from December 15, 2015 and was separated from employment on April 19, 2016, when she was discharged.

The employer has a written attendance policy. If an employee falls below 93 percent of their scheduled hours then the employee is given a formal written warning and placed on probation for three months. If the employee then falls below 93 percent during the three months, then the employee is discharged. Claimant was made aware of the policy when she was hired. The employer does not require doctor's notes.

Claimant was given a formal written warning and placed on probation for three months on February 24, 2016 for attendance issues. Claimant was not at 93 percent of her scheduled hours. Claimant was warned that her job was in jeopardy and that any further violation may result in discharge. Claimant signed for the warning. Claimant had eleven absences that lead to this warning. Three of the absences were for illness; four of the absences were for personal family issues; two of the absences claimant left early to go to her other job; and one of the absences was due to weather.

On April 19, 2016, the employer received a report regarding claimant's attendance percentage. On April 19, 2016, claimant was at 86 percent attendance, which was the reason for discharge. The final absence was on April 6, 2016. Claimant called in and stated she was sick. Claimant was also absent on: March 8 (claimant left early for personal family issues), March 9 (claimant was sick), March 14 (claimant had to fix her car), March 18 (claimant had transportation issues), March 22 (claimant was a no-call/no-show), March 23 (claimant had personal issues with her son), and March 24 (claimant was absent due to weather but the employer was open that day).

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 § 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(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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*.

An employer’s attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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*.

A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Because claimant’s last absence on April 6, 2016, was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The May 25, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/can