

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SHERYL L GILSON
Claimant

LONGBRANCH INC
Employer

APPEAL 15A-UI-12906-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/18/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 9, 2015 (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 9, 2015. The claimant participated personally. The employer participated through Douglas De Long, Chief Financial Officer. Employer's Exhibits A through G were admitted into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

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 housekeeper and was separated from employment on October 20, 2015; when she was discharged for excessive unexcused absences (Employer's Exhibit C).

The employer has a policy which provides an employee will be discharged upon receiving a third written warning in a one-year period (Employer's Exhibit F). The claimant was trained and received a copy of the employer's policies upon hire. The employer also has an attendance policy that requires employees call off shifts at least two hours prior to the start time by talking to their manager (Employer's Exhibit D and E). The employer's policy states that leaving a message with anyone other than the manager will be counted as an unexcused absence.

The claimant received a written warning on August 14, 2015 for failure to call off properly her shift missed due to a domestic dispute and sore leg (Employer's Exhibit A). The claimant received a second warning on September 2, 2015, for failure to call off properly when she missed work due to a hangover. At the hearing, the claimant asserted she had requested the time off but it was denied. In the warning, which was signed by the claimant, it stated, "next write up will result in termination as it will be the 3rd unexcused" (Employer's Exhibit B). The claimant denied calling off improperly during her employment. On both warnings, the claimant was provided an opportunity and space to write comments and declined.

The final incident occurred when the claimant called off her October 20, 2015 shift. The claimant's door was kicked in and she needed to have her home secured before leaving. The claimant called the employer at 8:25 a.m. after her shift began to report the absence. When the claimant called, she spoke to Shanna, a desk clerk, and not her manager, Kathy Lunsmen. The employer reports that the Ms. Lunsmen was clocked in and on-site on the morning the claimant called off, and her cell phone is also made available to employees. The claimant was subsequently discharged. No explanation about why the claimant had missed work was provided to Ms. Lunsmen until after separation when the claimant completed an "exit interview" type of form (Employer's Exhibit G).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 of proof in establishing disqualifying job misconduct. An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work.

Excessive absences are not considered misconduct unless unexcused. 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." 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant had two prior warnings for unexcused absences (Employer's Exhibit A and B) and knew her job was in jeopardy. On October 20, 2015, the claimant did not notify her manager, Kathy Lumsen, of her intended absence, within the two hours required by the employer's policy. Rather, the claimant spoke to Shanna, who was a desk clerk, and not management. The employer's policy specifically states that a message left for someone other than management, will be considered unexcused (Employer's Exhibit D). The claimant did not present persuasive evidence that she was unable to properly call off the absence, to Ms. Lumsen, and therefore, her absence was unexcused. The employer further testified that had the claimant spoken to Ms. Lumsen and informed her of the reason behind the absence, the employer could have possibly worked with the claimant. The employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The November 9, 2015 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

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