

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SHAUNTAL M DEAN
Claimant

MID-STEP SERVICES INC
Employer

APPEAL 17A-UI-06462-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 06/04/17
Claimant: Appellant (1)

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 June 23, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 14, 2017. The claimant participated personally. The employer participated through Jan Hackett, human resources director. Employer Exhibits 1 through 10 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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 full-time as a residential living assistant and was separated from employment on June 5, 2017, when she was discharged for excessive tardiness.

The employer tracks its attendance infractions, including tardies, on a point basis. Upon receipt of 12 points in a rolling 9 month period, an employee is discharge. The claimant was aware fo the employer's policy and aware that if she was tardy more than 3 minutes past her start time, she would receive points under the policy. (The employer allocates the points based on how late an employee is.) The decision to discharge the claimant was based solely on tardies and not any absences.

In April 2016, the claimant was issued a suspension in response to her tardies (Employer Exhibit 7). She received a written warning on June 30, 2016, for continued tardiness (Employer Exhibit 6). She was issued a one day suspension on January 25, 2017 and a two day suspension on March 20 and 21 in response to continued tardiness (Employer Exhibits 4 and 5). Between December 13, 2016 and June 3, 2017, the claimant had 30 tardies, ranging from 4

minutes to three hours late. The final incident occurred on June 3, 2017, when the claimant overslept for her usual 5:30 a.m. shift and arrived at 8:28 a.m. The claimant cited to exhaustion and being drained, but was subsequently discharged.

The claimant attributed her tardies in December and January 2017, due to transportation issues because her driver did not like to get up early. The claimant obtained her own car early in February 2017 and stated her tardies in the 4 to 7 minute range were often due to trains and having to reroute for a train. The claimant also stated she voluntarily accepted to take on more shifts, recognizing the staff shortage, and being "soft hearted." Consequently, the claimant frequently worked 60 hour weeks, and struggled to juggle her work with her responsibilities as a single mom and while in school full-time, taking online classes. The claimant stated she was often exhausted and overslept or missed her alarm. The claimant acknowledged she relied solely on her cell phone alarm and did not purchase another alarm when she realized she struggled to awaken. The claimant also did not bid for a later shift time, though she could have throughout employment.

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 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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. 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." 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).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) ("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The administrative law judge is persuaded the claimant was aware of the employer's policies which allowed a three minute grace period to clock in for a scheduled shift. In the period of December 13, 2016 through June 3, 2017, the claimant was tardy 30 times to her shift, ranging from 4 minutes to three hours. The reasons the claimant offered for her

tardies of having transportation issues, being exhausted and oversleeping would not excuse the tardies under Iowa law.

The administrative law judge recognizes the claimant's dedication to the employer by way of volunteering for overtime/additional shifts, and the balance she faced juggling employment with her school and family responsibilities. However, based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences (by way of tardies) 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 June 23, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn