

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHELSEY P DONOVAN
Claimant

ABM ONSITE SERVICES MIDWEST INC
Employer

APPEAL 17A-UI-06239-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/14/17
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 13, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 7, 2017. The claimant participated personally. The employer participated through Joel Kincaid, hearing representative with Employer's Edge. Christine Wetzler, human resources, and Amanda McNeil, supervisor, participated for the employer. Employer Exhibits 1 through 28 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.

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 full-time as a cleaner and was separated from employment on May 15, 2017, when she was discharged for continued tardiness (Employer Exhibit 3-4).

The employer has a written attendance policy prohibiting tardiness. The claimant was made aware of the employer's policies upon hire. Specifically, the employer defines excessive tardiness as 7 tardies within a 180 period. The claimant was tardy November 21, 2016, December 8, 12, 19 and 28, 2016, January 4 and 10, and April 17, 2017. The employer considers an employee to be tardy if they have not called into the provided 800 phone line and entered their personal pin number. The employer allows a five minute grace period for shift starts but not arriving late from lunch. The claimant's tardies were documented by the employer and the claimant signed receipt of acknowledgement (Employer Exhibits 5-24). The claimant was suspended on April 17, 2017 in response to her tardiness.

The claimant continued to be tardy, citing multiple reasons including once having car issues, having childcare issues and personal issues related to housing, and because she was worried. The claimant also has anxiety and depression but furnished no medical documentation for the hearing that they affected her ability to be at work on time. The claimant also acknowledged the tardies that were a few minutes only were for no reason. After her suspension, she was tardy again on May 1, 2, 3, 4, 5, 9, 10, 2017. The claimant was both tardy to her shifts and late back from lunch on May 9 and 10, 2017. The claimant was then suspended for three days pending review of her history before being discharged. The claimant's tardies on May 9 and 10, and late lunches were not due to unavoidable incidents or documented medical issues. She was subsequently discharged.

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(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 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).

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 required employees to be clocked in within five minutes of their start time and to return on time from lunch breaks. The claimant in this case had fourteen tardies and two extended/late lunches in a six month period (Employer Exhibits 5-24). The claimant knew or should have known her job was in jeopardy based on the documented attendance infractions and the suspension on April 17, 2017, yet she continued a pattern of tardiness. The final incident occurred on May 10, 2017, when the claimant was both late to her shift, and late back to lunch.

The administrative law judge is sympathetic to the claimant’s personal issues related to housing and childcare, as well as her health conditions. However, no credible evidence was presented to support that the claimant’s repeated tardiness was attributed to a medical condition, or due to unavoidable incidents. Childcare and transportation are not excusable reasons for absences or tardies in the context of unemployment insurance law in Iowa. The claimant did not offer credible evidence to excuse her final tardy or late lunch on May 10, 2017. Based on the evidence presented, 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 June 13, 2017, (reference 02) unemployment insurance 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