

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CHRISTINA L PETERSON**  
Claimant

**DUBUQUE COUNTY**  
Employer

**APPEAL 18A-UI-06865-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/27/18**  
**Claimant: Appellant (2)**

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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 15, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for repeated tardiness. The parties were properly notified of the hearing. A telephone hearing was held on July 12, 2018. The claimant, Christina Peterson, participated, along with witness Ginny Manemann. The employer, Dubuque County, participated through Cris Kirsch, Administrator at Sunnycrest Manor.

**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: Claimant was employed full time, most recently as a rehab CNA, from June 30, 2006, until May 22, 2018, when she was discharged for tardiness. Claimant's final late arrival occurred on May 20, 2018, claimant was three minutes late to work. Claimant did not call and notify anyone that she was going to be late to work. Claimant explained that she has gastrointestinal issues due to fructose and lactose intolerances, and these delayed her leaving the house that morning. Claimant was also five minutes late to work on May 10, 2018, and twenty minutes late to work on April 27, 2018, for the same reason. Claimant did not call to report either of these late arrivals.

On January 20, 2018, claimant received a final written warning related to late arrivals. According to the employer, claimant had been late sixteen times between August 24, 2017, and January 12, 2018. During this final written warning, claimant and her union representative Manemann raised the possibility of FMLA as an accommodation for claimant's gastrointestinal issue. The nurse issuing claimant the final written warning told them that FMLA would not cover this. There is no indication that anyone from Human Resources ever reached out to claimant after this meeting to discuss intermittent FMLA or any other accommodation that may be available for her.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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).

Excessive absences are not considered misconduct unless unexcused. 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*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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.

In this case, claimant’s final late arrival was due to a medical issue. Claimant had discussed this medical issue with the employer back in January 2018 and had inquired about FMLA leave to help with late arrivals due to the issue. The employer told claimant that intermittent FMLA leave was not available for her. The administrative law judge does not believe this is a correct understanding of intermittent FMLA. Once claimant reported her health issue to the employer, the employer was on notice and should have contacted Human Resources to ensure it gave claimant correct information about FMLA and any other accommodation that may be available for her issue. Claimant’s May 20 late arrival was due to a medical issue and was not willful or deliberate misconduct. Benefits are allowed, provided she is otherwise eligible.

**DECISION:**

The June 15, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

lj/rvs