

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEANNE M SMITH
Claimant

APPEAL 16A-UI-06369-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS ENTERPRISES INC
Employer

**OC: 07/19/15
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 3, 2016 (reference 08) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for excessive unexcused absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A partial telephone hearing was held on June 22, 2016 and was concluded on July 11, 2016. The claimant, Jeanne M. Smith, participated personally. The employer, Wells Enterprises, Inc., participated through Hearing Representative Alyce Smolsky and witness David Anderson. Claimant's Exhibits A and B were admitted. Employer's Exhibits One and Two were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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 full time as production assistant. She was employed from April 18, 2016 until May 12, 2016. Her job duties included watching the production line, stacking boxes, and ensuring the labels were correct. Claimant's immediate supervisor was Bizmark Roman.

The employer has a policy in place regarding absenteeism which provides that regular attendance at work is required. See Exhibit Two. The employer's policy provides that if an employee who is within their first 180 days of employment has five occurrences of absenteeism during that period, they will be discharged.

Claimant was made aware of the policy when she acknowledged that she reviewed that policy. The policy also provides that upon three occurrences an employee will receive counseling or coaching; upon four occurrences an employee will receive a written warning; and upon five occurrences an employee will be discharged. See Exhibit Two. Claimant never received any verbal coaching or counseling or a written warning prior to discharge.

The policy defines a non-approved absence as an absence or tardy that is not approved by the employee's supervisor before the end of their last shift worked. See Exhibit Two. Employees accrue occurrences depending on whether the absences are reported and how long the employee is absent for. See Exhibit 2.

Claimant was absent on the following dates: May 1, 2016; May 3, 2016; May 4, 2016; May 5, 2016; and May 9, 2016. The employer counted each of these absences as an occurrence and claimant reached five occurrences on May 9, 2016. As such, she was discharged from employment due to absenteeism. Claimant was also absent on May 10, 11, and 12, 2016 and her discharge had not yet been communicated to her.

The employer's policy requires that employees call in to report their absence. There is a telephone number on the back of each employee's badge for this specific purpose. Claimant followed the procedure to call in and report her absences prior to the scheduled shift start time for each of the dates she was absent that are listed above. Claimant further left a voicemail message for her direct supervisor and Mr. Anderson regarding her absences.

The claimant was absent for her entire shift on Sunday, May 1, 2016. Claimant's pet cat had been severely injured and claimant was distraught over the situation. Claimant could not work on May 1, 2016 because she was too distraught.

Claimant worked on May 2, 2016; however, she continued to be distraught at work regarding her injured pet. Her supervisor believed that she could not continue to work and sent her home. Claimant was not issued an occurrence for this early departure on May 2, 2016 under the absenteeism policy. See Exhibit Two. The employer's policy provides that a supervisor is authorized to send an employee home when an illness or injury is present by which there is either: 1.) a reasonable possibility of product, product-contact surfaces, or product packaging materials becoming contaminated or 2.) a violation of GMPs (good manufacturing practices) may reasonably occur or has occurred. In these situations, an occurrence would not be issued.

On May 2, 2016, claimant took her pet to the veterinary office and they advised that she have the pet euthanized due to the extensive injuries and pain the pet was in. Claimant refused and brought the pet home with medication.

During the evening of May 2, 2016, claimant developed a sore in her mouth. This sore caused her pain and she was unable to eat or talk. On May 3, 2016, claimant reported via the telephone reporting system that she would not be able to work due to illness prior to her scheduled shift start time.

On May 4, 2016, claimant was still ill with the sore, which led to an infection, and reported via the telephone reporting system that she would not be able to work due to illness prior to her scheduled shift start time. Claimant was still ill on May 5, 2016 and sought medical attention. See Exhibit A. The advanced registered nurse practitioner that claimant saw believed that the sore was induced by the stress and anxiety stemming from the injuries from her pet. By this time her pet had run away and she believed that the pet had left to die on its own. She received a doctor's note excusing her from work from May 2, 2016 through May 8, 2016. See Exhibit A.

Claimant's next scheduled shift was May 9, 2016. Claimant was still suffering from the infection and called in and reported that she would not be able to work due to illness prior to her scheduled shift beginning. Claimant also made calls to the corporate office and to Mr. Anderson in the human resources department to let them know that she had a doctor's note for her absences.

Claimant was still ill on May 10, 2016. She properly reported her illness to the employer prior to her scheduled shift start time. Claimant was ill on May 11, 2016 and again properly reported her illness to the employer prior to her scheduled shift start time. Claimant sought medical attention again regarding her infection on May 11, 2016. See Exhibit B. She was given medication for the infection at this time.

She was ill from the infection and unable to work on May 12, 2016 as well. Claimant called and reported her absence from work on May 12, 2016 via the employer's telephone call in system.

Claimant became well over the course of the weekend and was able to return to work on Monday, May 16, 2016. Claimant reported to work on this date and her identification badge did not allow her access to the building. She was escorted to Mr. Anderson's office. At this time she was told that she had been discharged for her absences on May 1, 3, 4, 5, and 9, 2016. See Exhibit One. Claimant attempted to give her doctor's notes to Mr. Anderson; however, he did not accept them. Claimant asked when she could re-apply for a job with this employer. Mr. Anderson was unsure and stated that he would check into this for her and get back in touch with her. She was told to leave the building and she did.

The following day on May 17, 2016, Mr. Anderson left claimant a voicemail to call him back because there was a possibility she could come back to work if she completed the personal leave of absence paperwork to convert her absences to "excused" under the employer's policy. Claimant returned Mr. Anderson's telephone call and did not reach him. She left him a voicemail.

Mr. Anderson again attempted to reach claimant on May 18, 2016 to gather information regarding a personal leave of absence. He did not reach her but left a voicemail for her to return the call. Claimant returned his call the same date and did not reach Mr. Anderson. She left a voicemail for Mr. Anderson to return her call. Mr. Anderson did not return the claimant's call and believed that there were no further steps for him to take in order to gather the necessary information from claimant to submit a voluntary leave of absence application. There was no further communication between the parties.

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. Benefits are allowed.

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 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

In this case the claimant properly reported all of her absences. The absence on May 1, 2016 was due to stress and anxiety she suffered regarding the injuries to her pet. The absences on all the other dates were due to claimant's illness due to an infection in her mouth and throat. As such, claimant had no unexcused absences.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. In this case, there were no absences that were unexcused.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. *Milligan v. Emp't Appeal Bd.*, No. 1-383 (Iowa Ct. App. Filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, we should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. 85-1418, (Iowa Ct. App. filed June 4, 1986).

Because the absences were properly reported due to illness, there is no current or final act of misconduct. Since the employer has failed to meet its burden of proof in establishing a current or final act of misconduct that would be disqualifying, benefits are allowed.

DECISION:

The June 3, 2016 (reference 08) unemployment insurance decision denying benefits 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.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

db/can