

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VICKIE J BROWN
Claimant

DRM INC
Employer

APPEAL 20R-UI-00396-AW-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 10/20/19
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Eligibility – A&A – Able to, available for, work search

STATEMENT OF THE CASE:

Claimant filed an appeal from the November 8, 2019 (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was scheduled for December 9, 2019. No hearing was held because appellant failed to respond to the hearing notice and provide a telephone number at which appellant could be reached for the scheduled hearing. On December 10, 2019, a default decision was issued dismissing the appeal.

On December 24, 2019, Claimant appealed to the Employment Appeal Board (EAB). On January 13, 2020, the EAB remanded this matter to the Appeals Bureau for a hearing on the merits. Upon remand, due notice was issued and a hearing was held on January 31, 2020 at 1:00 p.m. Claimant participated. Employer participated through Hearing Representative Thomas Kuiper. Employer's witnesses included District Manager James Correa and General Manager Jessica Briggs. No exhibits were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct or a voluntary quit without good cause attributable to employer.
Whether claimant is able to and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time crew member from May 1, 2019 until her employment with DRM, Inc. (a fast food restaurant) ended on September 13, 2019. (Correa Testimony) Claimant's schedule varied. (Correa Testimony) Claimant's direct supervisor was Tasha Gardner, General Manager. (Correa Testimony)

Employer has a written attendance policy accessible to employees online. (Correa Testimony) The policy states that employees must make their best attempt to notify the general manager or their supervisor of any absences by calling their store. (Briggs Testimony) The policy also provides that one no-call/no-show absence may be disciplined up to termination. (Correa Testimony) All employees receive training on the attendance policy during orientation. (Correa Testimony)

On September 4, 2019, claimant's supervisor called claimant a "fucking bitch" and told claimant to go home. (Claimant Testimony) Claimant was scheduled to work on September 5, 2019. (Claimant Testimony) Claimant did not report to work on September 5, 2019. (Claimant Testimony) Claimant contacted employer after her shift began because she was trying to avoid speaking with her supervisor. (Claimant Testimony) Claimant was calling to ask whether she was supposed to report to work; claimant was uncertain of her job status following her supervisor's statements on September 4, 2019. (Claimant Testimony) Employer did not answer claimant's call; employer does not have voicemail. (Claimant Testimony) Claimant was scheduled to work on September 6, 2019. (Claimant Testimony) Claimant did not report to work on September 6, 2019. (Claimant Testimony) Claimant contacted employer prior to the beginning of her shift to inquire about whether she was supposed to report to work. (Claimant Testimony) Employer did not answer claimant's call. (Claimant Testimony) On September 9, 2019, claimant contacted employer to inquire about the status of her employment. (Claimant Testimony) Employer answered claimant's call and told claimant that it terminated claimant's employment for violation of employer's attendance policy for no-call/no-show. (Claimant Testimony) There is no evidence that claimant accrued other absences or that claimant had prior warnings regarding her attendance. Claimant did not intend to quit her job. (Claimant Testimony)

Claimant has cataracts, which do not interfere with claimant's ability to work in a well-lit area. (Claimant Testimony) Claimant has had no other barriers to her ability to or availability for work since filing her original claim effective October 20, 2019.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not voluntarily quit her employment; claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer. Iowa Code §§ 96.5(1). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the employment relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). In this case, claimant had no intention of terminating her employment relationship with DRM, Inc. as evidenced by her continued attempts to contact employer. Because claimant did not voluntarily quit her job, claimant's separation from employment must be analyzed as a discharge.

Iowa Code section 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 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:

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.

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.

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 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. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absence is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

Excessive absenteeism has been found when there have 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.*, 364 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).

Based upon the supervisor's actions on September 4th, claimant's absences on September 5, 2019 and September 6, 2019 were reasonable. Claimant did not provide notice prior to the beginning of her shift on September 5, 2019; therefore, the absence is unexcused. Claimant attempted to provide notice prior to her shift on September 6, 2019; therefore, the absence is excused. There is no evidence that claimant accrued other absences or received prior warnings regarding her attendance. Claimant's one unexcused absence is not excessive. Employer has not met its burden of proving disqualifying, job-related misconduct. Claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

The next issue to be determined is whether claimant is able to and available for work. For the reasons that follow, the administrative law judge concludes the claimant is able to and available for work.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1), (2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) *Able to work.* An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood. . . .

(2) *Available for work.* The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

An individual claiming benefits has the burden of proving that she is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22. Claimant has been able to and available for work since filing her original claim on October 20, 2019. Accordingly, benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The November 8, 2019 (reference 02) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Furthermore, claimant is able to work and available for work. Benefits are allowed, provided claimant is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/scn