

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIFFANY D JACOBSON

Claimant

APPEAL 22A-UI-00278-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HEALTH SERVICES-IOWA CORP

Employer

OC: 10/24/21

Claimant: Appellant (2)

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On November 29, 2021, the claimant/appellant filed an appeal from the November 19, 2021, (reference 02) unemployment insurance decision that denied benefits based on claimant being discharged on October 4, 2021, for excessive unexcused absenteeism and tardiness after being warned. The parties were properly notified about the hearing. A telephone hearing was held on January 24, 2022. Claimant participated at the hearing. Employer participated through hearing representative, Michael Baughman. Erin Hollister and Jennifer Tuttle were called as witnesses for the employer. Exhibits 1, 2, 3, 4, and 5 were admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits.

ISSUE:

Was the separation a discharge for job-related misconduct that disqualifies claimant from benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 9, 2015. Claimant last worked as a full-time Lifeline marketing representative. Claimant was separated from employment on September 21, 2021, when she was discharged for her attendance, tardiness, and behavior.

The employer has an attendance policy where employees accumulate points if they do not call in or show up for their shifts, leave early from their shift and forget to clock out during their lunch. (Exhibit 1). The employer has a policy that employees need to call in prior to their shift if they will not be able to work. Claimant was aware of the policy.

On September 20, 2021, claimant did not call in prior to her 8:00 scheduled shift. Claimant overslept because her alarm clock did not go off. Claimant showed up to her shift late.

Claimant was absent on July 9, 2021. Claimant called into work because she was sick. On June 21, 2021, claimant did not work her regular shift because she was attending a funeral. Claimant showed up to work early and worked from 7:30 a.m. until 9:30 a.m. Claimant informed

employer she would attempt to return after the funeral. Claimant did not return to work. Claimant received permission to leave from Ms. Tuttle.

On June 11, 2021, claimant was absent. Claimant called into work. Claimant is unsure why she was absent.

On March 11, 2021, claimant left for lunch without clocking out.

On March 16, 2021, claimant received a written warning for failing to clock out for her lunch break. (Exhibit 2). Claimant was informed she could be terminated if she continued to fail to meet and maintain the employer's policies.

On June 24, 2021, claimant received a second warning for failing to show up for her afternoon shift. (Exhibit 3). Claimant was informed that she could be terminated if she accumulated another unplanned absence. Claimant was instructed to call when she will be late or absent prior to shift. (Exhibit 3).

On July 28, 2021, claimant was put on a performance action plan due to her attendance.

On September 21, 2021, claimant was terminated because she does not communicate with her manager regarding the need to leave early, come in late, and for having two no call, no shows. (Exhibit 5A). The employer found these violations violated her performance action plan.

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.

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(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*, supra; *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*, supra.

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.*

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.

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.*, 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).

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

The employer has not established that claimant had unexcused absences which would be considered excessive for purposes of unemployment insurance eligibility. Claimant's September 21, 2021 tardy and June 11, 2021, absence were unexcused absences. The rest of claimant's absences were excused and for reasonable grounds. Once unexcused absence and one unexcused tardy in three months does not meet the excessiveness standard to establish misconduct. Accordingly, benefits are allowed.

DECISION:

The November 19, 2021, (reference 02) unemployment insurance decision is REVERSED. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

February 16, 2022
Decision Dated and Mailed

cs/scn