

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

TANISHA L ROBERSON
Claimant

APPEAL NO. 19A-UI-00247-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE COUNTY
Employer

OC: 12/09/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Tanisha Roberson (claimant) appealed a representative's January 8, 2019, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Dubuque County (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 25, 2019. The claimant participated personally. The employer participated by Cris Kirsch, Administrator. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 25, 2016, as a part-time food service worker. She signed that she read and understood the contents of the Sunnycrest Manor Employee Guide on January 25, 2016, but she did not receive a copy of the document. The Cumulative Point Plan of The Guide states that an employee will receive a counseling at three points, a verbal warning at five points, a written discipline at seven points, a final notice at ten points, and be terminated at twelve points. The Plan did not indicate a period in which points will accumulate. On February 6, 2018, the claimant signed for receipt of the Cumulative Point Plan.

The claimant was tardy from time to time due to illness caused by her pregnancy. She properly reported each incident. The employer assessed the claimant one-half point for each tardy. It did not intend to give her any points if she were called in by her supervisor to work an extra shift. The employer documented the claimant as tardy on May 11, 26, June 30, and July 1, 2018. The claimant was not given access to the employer's accounting of her points. She earned one point back in August 2018.

On October 24, 2018, the employer issued the claimant a final written warning for attendance and tardiness. The document listed her tardiness on October 13 and 18, 2018. It did not indicate the number of points the claimant had accumulated. The claimant did not sign the warning because she knew she was either not late for work or her supervisor called her in to work when she was not originally on the schedule for those days. The employer's records showed the claimant as tardy on October 17, 18, and 24, 2018, but these dates were not listed on the warning of October 24, 2018. The employer notified the claimant that further infractions could result in termination from employment.

On October 29, 2018, the employer prepared another final written warning. The claimant signed the document on November 14, 2018. There were no additional incidents of tardiness. The reason for the document was to change the claimant's working hours.

On December 11, 2018, the claimant's six year old daughter became sick on her way to school. The claimant called and reported her impending tardiness to the employer. She took care of her daughter and reported six minutes late to work. On December 12, 2018, the employer terminated the claimant for having twelve attendance points. The dates and point totals were not provided to the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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:

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.

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. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The employer has a policy for attendance that states employees will be terminated if they accumulate twelve points in an unknown period of time. The employer provided dates and point totals for 8.5 attendance points. All but the last incident was due to properly reported illness.

The final incident of tardiness was reported to the employer and for the illness of the claimant's daughter. One absences/tardiness is not excessive. While it is true that an employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work, it is also true that the employer should gather that information for determination regarding whether the absences are excused. The employer has not provided sufficient evidence that the claimant's absences were unexcused. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's January 8, 2019, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs