

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

---

**MARCIA L ROMINE**

Claimant

**OMG MIDWEST INC**

Employer

**APPEAL 14A-UI-12342-L**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/02/14**

**Claimant: Appellant (1)**

---

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 24, 2014 (reference 01) decision that denied benefits because of a discharge from employment. After due notice was issued, a hearing was held on December 18, 2014, in Des Moines, Iowa. Claimant participated. Employer participated through regional safety manager Raquel Whitehill and human resource director Amy Keith.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time construction laborer asphalt paving/highway construction from April 3, 2000 through October 13, 2014. Her last day of work was October 3, 2014 when she worked light duty in the office. She injured her knee and leg (ruptured ACL and torn meniscus) at work on August 25, 2014 and was placed on a light-duty medical restriction. Supervisor Gene Baloun left messages for claimant twice on August 28, twice on September 2, and once each on September 3, 4, and 5 that light duty work was available to her. She did not respond so a letter was mailed to her on September 5 advising her of the same thing and asking her to return the phone calls. She received the letter on September 9 but did not respond or report. The most recent, most restrictive medical restriction according to the employer's designated physician Steven Aviles was dated September 24, 2014 for seated duty only. Operations manager Jeff Chapman had no light duty office work available to claimant between October 3 and October 10 but did notify her by an October 6 letter that the employer was exercising its right to provide her Transition to Work temporary employment at a non-profit agency, Visiting Nurse Services, with same rate of pay. She was instructed to report to this agency on October 13, 2014 or face discharge from employment. The October 6 letter was returned to the employer on October 24 after delivery attempts on October 9 and 17. On Saturday, October 11 the employer had Federal Express deliver an equivalent October 6

letter to claimant that work was available on Monday, October 13 at Visiting Nurse Services. She did not report or otherwise communicate with the employer because she had mistakenly consumed oxycodone and hydrocodone together, which inhibited her ability to function, but she was able to set an appointment with physician David Harrison, D.O. on October 10. Harrison took her off work for 30 days because of knee pain. She mailed and hand-delivered a note to the reception desk at the home office on Tones Drive in Ankeny where Chapman's office is located but did not directly notify him or anyone in management about the doctor visit or new restriction/excuse from work. She did notify the workers' compensation insurance carrier representative James Barham of Liberty Mutual, who notified Whitehill and the nurse case manager via e-mail and said the carrier would not honor that opinion. Claimant had been warned in December 2013 about remaining in contact with the employer and answering phone calls. She has also been non-compliant with treatment orders and had canceled appointments due to oversleeping and lack of transportation on September 9 even though the employer offered to provide it.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct.

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 of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer’s attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The employer has credibly established that claimant failed to communicate with the employer as directed, failed to properly notify the employer of her work-related medical status, and failed to report for light duty work consistent with her most restrictive limitation at least once. She had been warned about maintaining proper communication with the employer and her failure to abide by that warning is evidence of unexcused absenteeism due to improper reporting. It is also considered deliberate action in violation of company policy, procedure, or prior warning.

**DECISION:**

The November 24, 2014 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

---

Dévon M. Lewis  
Administrative Law Judge

---

Decision Dated and Mailed

dml/can