

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANNA M CHESMORE
Claimant

CENTRAL IOWA KFC INC
Employer

APPEAL 17A-UI-05278-LJ-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 04/16/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 9, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 5, 2017. The claimant, Anna M. Chesmore, participated. The employer, Central Iowa KFC, Inc., participated through Delta Spivey, RGM; and Glen Johnson, Coach.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time, most recently as a Customer Service Team Member, from March 25, 2008, until February 22, 2017, when she was discharged for absenteeism. Claimant last reported to work on February 16, 2017. She texted a team leader on February 17, 2017, to report that she was not coming to work. The employer testified that the team leader responded that she was at the bank so claimant needed to call the RGM at the restaurant. Claimant did not call the RGM. Claimant testified that her standard practice was to text the team leader if she was going to be absent, though she also testified that she called the employer sometimes because calling was quicker than texting. Claimant was next scheduled to work on February 21, 2017. Claimant did not come to work that day and she did not call to report that she would be absent. Claimant testified that she did not have a working telephone that day so she could not report her absence. Claimant was scheduled to work at 10:00 a.m. on February 22, 2017. Claimant called after 10:00 a.m. to report that she would be late due to transportation issues. Spivey notified claimant at that time that she no longer had employment.

Claimant received a final written warning for her attendance on or about January 4, 2017. The employer testified that between December 2 and January 4, claimant was late on eight occasions. On December 2, 2016, claimant was one hour and twenty-four minutes late. On

December 6, 2016, claimant was one hour late. On December 7, claimant was forty minutes late. On December 9, claimant was one hour and seven minutes late. On December 23, claimant was twenty-five minutes late. On December 27, claimant was one hour and three minutes late. On December 28, 2016, claimant was twenty-nine minutes late. On December 30, 2016, claimant was thirty-one minutes late. Claimant admits she was late on at least some of these occasions, as it was mid-winter and she had transportation issues. The employer testified that claimant had received a written warning on December 8, 2016, due to her attendance. Around this time, claimant's start time was moved from 8:00 to 10:00 a.m., to help her arrive at work on time. However, claimant continued to arrive to work late.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for excessive, unexcused absenteeism. Benefits are withheld.

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(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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer provided more credible testimony than the claimant.

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. 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* 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. 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 point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. However, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment and the final absence was not properly reported or excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The May 9, 2017 (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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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