

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JASMINKA SERIC
Claimant

CALVIN COMMUNITY
Employer

APPEAL 22A-UI-01824-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/31/21
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code section 96.4(3)a – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant, Jasminka Seric, filed an appeal from the December 15, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged for failure to follow instructions in the performance of her job. Initially, the hearing was scheduled to occur on February 10, 2022. The claimant requested a postponement because they had not yet hired an attorney. The administrative law judge granted the claimant's postponement.

A hearing was scheduled to occur on February 25, 2022. Prior to the start of that hearing, the employer, Calvin Community, requested a postponement, which was granted.

A telephone hearing was held on March 7, 2022. The claimant participated and testified. The claimant was represented by Marlon Mormann, attorney at law. The employer participated through Human Resources Director Matt Puffer, Assistant Director of Nursing Juliana Cormick, and Licensed Practicing Nurse Tania Cochran. Exhibit A, B, and 1 were received into the record. The claimant participated through a Bosnian interpreter service provided by CTS Language Link.

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:

The claimant worked as a part-time universal worker for the employer from January 13, 2009, until her employment ended on October 29, 2021, when she was discharged. The claimant's direct supervisor was Director of Nursing Juliana Cormick.

The employer has an employee handbook which outlines all of its various policies. The employee handbook has a work rule that states leaving work during work hours without approval constitutes job abandonment. The claimant acknowledged receipt of the employee handbook on January 13, 2009.

On October 26, 2021, the claimant was scheduled to see the dentist for some tooth pain. On that day, the claimant's dentist performed oral surgery on her to correct the issue with her teeth. The oral surgeon told the claimant that if she did not feel well, then she could call in sick the following day. The claimant did provide a copy of a doctor's note written by Dr. Phelan Thomas confirming she had a tooth extraction on that day. (Exhibit B)

On October 27, 2021, the claimant was scheduled to work from 6:00 a.m. to 2:00 p.m. The claimant was scheduled to work in the assisted living department that day. At 7:08 a.m., Ms. Cormick received a call from Certified Medical Assistant Juana Rounsville informing her that she had just worked a double and had not seen the person scheduled to relieve her in the dementia unit. At 7:14 a.m., Ms. Cormick spoke with Certified Medical Assistant Nana Hasanovic and directed the claimant through her to report the dementia unit. Ms. Cormick stated if the claimant was unwilling to work in the dementia unit that day, then Ms. Cormick would cover the shift. At 10:15 a.m., Licensed Practicing Nurse Tania Cochran informed Ms. Cormick that the claimant had left the facility. On her way out of the building, the claimant informed Ms. Hasanovich that she had to leave because she was experiencing severe dental pain. This left Certified Medical Assistant Grace Mwathi to cover the dementia unit until Ms. Cormick was able to assist her.

The claimant's next scheduled shift was on October 29, 2021. The claimant filled out a form to use sick time for the absence on October 27, 2021. The claimant provided a copy of the form which is dated October 29, 2021. (Exhibit B)

On October 29, 2021, Director of Nursing Juliana Cormick and Human Resources Director Matt Puffer terminated the claimant for the incident occurring on October 27, 2021. They reasoned it was job abandonment per the rule because the claimant left during the middle of her shift without authorization.

The claimant had not previously been disciplined for excessive absenteeism. The employer contends this absence was more egregious because the claimant was to work in the dementia unit and being short one worker from that area could lead to a resident to elope.

The following section describes the findings of fact necessary for the ability to and availability for work issue:

The claimant has been able and available for work since her separation on October 29, 2021. The dental pain subsided a few days after she was terminated.

The administrative record KCCO shows the claimant made weekly claims from the week ending November 6, 2021 through the week ending March 19, 2022. The claimant stopped making employer contacts the week ending February 12, 2022.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to a non-disqualifying reason. He further finds the claimant was able and available for work effective October 29, 2021.

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 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.

871 IAC 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.

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 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).

The administrative law judge finds the claimant's absence on October 27, 2021 was due to illness. He further finds she left only after informing Ms. Hasanovich. So this absence was reported as due to illness prior to leaving and cannot be the basis for misconduct under Iowa Admin. Code r. 871-24.32(7).

Assuming arguendo the claimant's absence on October 27, 2021 is not excused, the administrative law judge finds the circumstances insufficient to be disqualifying. Iowa courts have evaluated whether one incident of attendance can be excessive as a matter of law. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether a single absence is sufficiently egregious to disqualify an employee from benefits is based on the following factors: 1) the nature of the claimant's work, 2) the effect of the claimant's absence on the employer's operations, 3) whether the claimant falsified her reason for the absence, and (4) whether the claimant notified the employer of her absence. *Id.* at 897.

As outlined in the findings of fact, the administrative law judge finds the claimant notified Ms. Hasanovich that she had to leave due to dental pain. There is not anything in the record suggesting the claimant lied about her reasons for being absent on that day. The claimant's work in the dementia wing is an aggravating circumstance because the absence of one worker can made a significant difference especially if a resident elopes from the facility. He finds that the effect of the claimant's absence was not significant enough to warrant disqualification because Mr. Cormick had enough notice to cover the claimant in the dementia wing to assist Ms. Mwathi.

For the reasons that follow, the administrative law judge concludes that the claimant was able to work and available for work effective the date of her termination.

Iowa Code section 96.4(3)a provides:

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

3. a. 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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A,

subsection 37, 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) and (3) provide:

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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

(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.

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(3) Earnestly and actively seeking work. Mere registration at a workforce development center does not establish that the individual is earnestly and actively seeking work. It is essential that the individual personally and diligently search for work. It is difficult to establish definite criteria for defining the words earnestly and actively. Much depends on the estimate of the employment opportunities in the area. The number of employer contacts which might be appropriate in an area of limited opportunity might be totally unacceptable in other areas. When employment opportunities are high an individual may be expected to make more than the usual number of contacts. Unreasonable limitations by an individual as to salary, hours or conditions of work can indicate that the individual is not earnestly seeking work. The department expects each individual claiming benefits to conduct themselves as would any normal, prudent individual who is out of work.

a. Basic requirements. An individual shall be ineligible for benefits for any period for which the department finds that the individual has failed to make an earnest and active search for work. The circumstances in each case are considered in determining whether an earnest and active search for work has been made. Subject to the foregoing, applicable actions of the following kind are considered an earnest and active search for work if found by the department to constitute a reasonable means of securing work by the individual, under the facts and circumstances of the individual's particular situation:

(1) Making application with employers as may reasonably be expected to have openings suitable to the individual.

(2) Registering with a placement facility of a school, college, or university if one is available in the individual's occupation or profession.

(3) Making application or taking examination for openings in the civil service of a governmental entity with reasonable prospects of suitable work for the individual.

(4) Responding to appropriate "want ads" for work which appears suitable to the individual if the response is made in writing or in person or electronically.

(5) Any other action which the department finds to constitute an effective means of securing work suitable to the individual.

(6) No individual, however, is denied benefits solely on the ground that the individual has failed or refused to register with a private employment agency or at any other placement facility which charges the job-seeker a fee for its services. However, an individual may count as one of the work contacts required for the week an in-person contact with a private employment agency.

(7) An individual is considered to have failed to make an effort to secure work if the department finds that the individual has followed a course of action designed to discourage prospective employers from hiring the individual in suitable work.

Iowa Admin. Code r. 871-24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

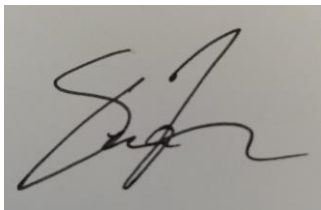
(1) An individual who is ill and presently not able to perform work due to illness.

(28) A claimant will be ineligible for benefits because of failure to make an adequate work search after having been previously warned and instructed to expand the search for work effort.

The claimant credibly denied any continuing symptoms of her illness. There is not information in the record to show she is currently not able and available for work. However, the claimant stopped making employer contacts during the week ending February 12, 2022. The claimant had not been previously warned regarding making employer contacts for each week she makes weekly claims. The claimant can consider this decision as her warning that she must continue to make the requisite employer contacts each week. Benefits are granted, provided she is otherwise eligible.

DECISION:

The December 15, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged for no disqualifying reason. Benefits are granted, provided she is otherwise eligible.



Sean M. Nelson
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March 30, 2022
Decision Dated and Mailed

smn/mh