

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHANIE C HILLYER
Claimant

APPEAL NO: 17A-UI-08430-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

OC: 07/16/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 7, 2017, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 12, 2017. The claimant participated in the hearing. Jamie Durkop, Attendance Manager and Geoffrey Hensen, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time customer service representative for AT&T Mobility Services from August 24, 2009 to July 18, 2017. She was discharged for exceeding the allowed number of attendance points.

The employer uses a no-fault, point-based attendance policy (Employer's Exhibit Two). Under the employer's policy, an absence less than five minutes in length results in zero points; an absence of five to 45 minutes results in .25 points; an absence of 46 to 150 minutes results in .50 points; an absence of 151 to 239 minutes results in .75 points; and an absence of 240 minutes and longer results in 1.00 point (Employer's Exhibit Two). Points expire after one year (Employer's Exhibit Two). Employees receive a counseling notice when they reach four points; a written warning when they reach five points; a final written warning when they reach seven points; and are terminated when they reach eight points (Employer's Exhibit Two).

The claimant had an unexcused absence of 40 minutes August 31, 2016, and received .25 points; she had an FMLA denied absence of 270 minutes September 1, 2016, and received one point; she had an unexcused absence of 117 minutes September 27, 2016, and received .50 points; she had an FMLA denied absence of 270 minutes September 29, 2016, and received one point; she had an FMLA denied absence of 186 minutes September 30, 2016, and

received .75 points; she had an absence due to illness October 13, 2016, and received 1.00 point; she had an FMLA denied absence of 270 minutes October 19, 2016, and received 1.00 point; she had an FMLA denied absence of 480 minutes October 20, 2016, and received 1.00 point; she had an FMLA denied absence of 187 minutes October 21, 2017, and received .75 points; she had an FMLA denied absence of 420 minutes October 25, 2017, and received 1.00 point; she had an absence due to illness of 36 minutes December 6, 2016, and received .25 points; she had an FMLA denied absence of 480 minutes December 12, 2016, and received 1.00 point; she had an FMLA denied absence of 240 minutes December 13, 2016, and received 1.00 point; she had an FMLA denied absence of 480 minutes January 17, 2017, and received 1.00 point; she had an FMLA denied absence of 282 minutes January 18, 2017, and received 1.00 point; she had an FMLA denied absence of 480 minutes January 19, 2017, and received 1.00 point; she had an FMLA denied absence of 360 minutes January 24, 2017, and received 1.00 point; she had an FMLA denied absence of 480 minutes January 26, 2017, and received 1.00 point; she had an FMLA denied absence of 480 minutes January 30, 2017, and received 1.00 point; she had an unexcused absence of 10 minutes June 23, 2017, and received .25 points; she was listed as a no-call/no-show June 24, 2017, and received 1.00 point; and she had an unexcused absence of five minutes July 11, 2017, and received .25 points (Employer's Exhibit One).

The claimant has chronic asthma, migraines and sinusitis and applied for FMLA during the fall of 2016. The third party provider denied her request stating it did not receive the required paperwork in a timely manner from the claimant's physician. She applied again and in April 2017 she and the employer learned her request for FMLA covering December 2016 and January 2017 was denied because the third party provider again stated it did not receive her paperwork in a timely manner although the claimant's doctor's stated the paperwork was submitted on time.

The claimant's June 23, 2017, 10 minute unexcused absence occurred when she was on her way back from lunch and ran into the union president who notified her she was under review for termination. On June 24, 2017, the claimant tried to report her absence due to illness on the phone app employees are required to use to report absences but it froze and would not take the claimant's information. On July 11, 2017, the claimant was five minutes late because she could not get on her computer to clock in.

The claimant received a counseling notice for attendance March 16, 2016; a written warning for attendance March 22, 2016; and another written warning for attendance December 20, 2016 (Employer's Exhibits Three, Four and Five). The employer did not have a record of the claimant receiving a final written warning as provided under the employer's attendance policy.

The employer terminated the claimant's employment July 18, 2017, for exceeding the allowed number of attendance points as the claimant had 18 attendance points at the time of termination.

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 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(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 job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

While the claimant had 18 attendance points at the time of her termination, 14.50 of those points were due to illness for which her request for FMLA was denied. Of her remaining 3.50 points 1.25 were related to illness for which she did not claim FMLA. Consequently, the claimant only had 2.25 attendance points unrelated to properly reported illness.

Additionally, the employer was aware in the fall of 2016 and in April 2017 that the claimant's request for FMLA was denied. That resulted in the claimant being assessed 8.50 points for December 2016 and January 2017 alone. The employer did not terminate the claimant's employment for exceeding the allowed number of attendance points at that time, however, and did not even issue the claimant any warnings in 2017, but instead waited approximately three more months to discharge her.

The employer did not follow its attendance policy. The claimant exceeded eight points on at least two occasions between August 31, 2016 and January 30, 2017, but her employment was not terminated on those occasions. She did not receive a written warning after December 20, 2016, and there is no evidence establishing she received a final written warning as required by the employer's policy.

Because all but 2.25 points received by the claimant were due to properly reported illness, the administrative law judge finds the employer has not established disqualifying job misconduct on the part of the claimant as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The August 7, 2017, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn