

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KERIANNE K BRITTON
Claimant

ALLEN MEMORIAL HOSPITAL
Employer

APPEAL 16A-UI-05811-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/27/16
Claimant: Appellant (2)**

Iowa Code §96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism
Iowa Code § 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 14, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 9, 2016. Claimant participated. Employer participated through Jill Grover, Director of Human Resources; Wendy Bienemann, Director of the Lab; and was represented by Kami Petigoue, attorney at law. Department's Exhibit D-1 was entered and received into the record. Employer's Exhibit 1 was entered and received into the record.

ISSUES:

Did the claimant file a timely appeal?

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a medical assistant 2/phlebotomist beginning on November 17, 2014 through February 26, 2016 when she was discharged due to attendance issues.

The claimant had been given the employer's attendance policy. The employer has a union contract with employees and their attendance policy is pursuant to negotiation. She knew that the only way to have absences due to illness for herself or for her child be considered as excused by the employer was to have them covered under leave obtained under the Family Medical Leave Act (FMLA). The claimant sought and obtained FMLA for herself. None of her absences that were covered by her FMLA were counted against her when the decision was made to discharge.

The claimant also missed work often to be with her ten-year-old son who had a serious mental health condition where he would threaten suicide. Her supervisor suggested to the claimant that she obtain FMLA for her son's condition so that the employer could consider her absences

to care for her son as excused. The claimant and her husband are in the process of divorcing. The claimant's husband's religion does not allow their son to be treated for mental health issues by anyone other than a pastor or counselor at their church. The claimant agreed to honor her husband's wishes with regard to her son's mental health treatment. She did seek to have her son counseled by the youth pastor at church and even sought to have that treatment covered by FMLA. Her research indicated that the youth pastor would not be considered a qualified medical provider under the FMLA. The employer gave the claimant at least two extensions of time in which to get her FMLA paper work turned in. Eventually the time expired on February 26, 2016 and the claimant's last three absences on January 8, 15 and February 5 were considered unexcused. All three of the absences were properly reported to the employer and occurred when the claimant chose to stay home to care for her son as he had threatened to harm himself. The claimant had no one else to care for her child.

Of the claimant's last nine occurrences or absences, all were due either to her own illness or that of her son.

The claimant filed an appeal via the online appeal system in a timely manner, but the appeal was never received the agency appeals unit.

REASONING AND CONCLUSIONS OF LAW:

The claimant filed an appeal in a timely manner but it was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The employer's no-fault absenteeism policy or union contract is not dispositive of the issue of qualification for benefits. The claimant was faced with an impossible situation: report to work to save her job, which would leave her ten-year-old child in danger of harming herself. While the employer certainly has the right to discharge, under these circumstances that administrative law judge cannot conclude that staying home to care for a mentally ill child is an unexcused absence for the purposes of unemployment insurance benefits. Additionally, the vast majority of the claimant's absences were for her illness or that of her child. Under these circumstances those absences are considered excused. Benefits are allowed.

DECISION:

The April 14, 2016, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs