

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

SONYA M ALLEN
Claimant

NEW CHOICES INCORPORATED
Employer

APPEAL 23A-UI-01337-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/01/23
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.2(d)(9) – Discharge for Excessive, Unexcused Absenteeism

STATEMENT OF THE CASE:

On February 9, 2023, claimant Sonya M. Allen filed an appeal from the January 30, 2023 (reference 01) unemployment insurance decision that denied benefits based on a determination that she was discharged on January 5, 2023 for repeated tardiness in reporting to work. The parties were properly notified of the hearing. A telephonic hearing was held at 2:00 p.m. on Thursday, February 23, 2023. Claimant Sonya M. Allen personally participated. Employer New Choices Incorporated participated through Brad Lemen, Human Resources Coordinator. Claimant's Exhibits A and B and Employer's Exhibits 1, 2, 3, and 4 were received and admitted into the record.

ISSUE:

Was the claimant discharged from employment for disqualifying excessive, unexcused absenteeism and tardiness in reporting to work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant Sonya M. Allen began working for the employer on October 21, 2021. She held a full-time position and worked as a direct support professional. Claimant's employment ended on January 5, 2023, when the employer discharged her for repeated tardiness in reporting to work.

Claimant's final late arrival occurred on Wednesday January 4, 2023. She was scheduled to work at 8:00 a.m. that day, but she did not arrive at work until almost 8:30 a.m. Claimant's supervisor was at the site where claimant was assigned to work that day, and she personally observed claimant arrive late. Claimant did not call to let anyone know she would be late, and she did not give a reason for arriving late to work.

Claimant had a number of late arrivals in the months leading up to the end of her employment. On Tuesday December 20, 2022, claimant arrived at work thirty minutes late. Claimant had an issue involving the father of her daughter coming into town to take her to a medical appointment, which caused her to be late to work. On Tuesday November 29, 2022, claimant

was thirty minutes late to work, likely due to a daycare issue. Claimant's supervisor noted claimant's late arrival in the employer's scheduling program, which the employer uses to track employees' time. On Thursday September 22, 2022, claimant was one hour late to work due to a transportation issue.

On Wednesday September 7, Wednesday September 14, and Wednesday September 21, claimant was late to work because of an issue at her children's daycare. The daycare was having staffing issues and in order to maintain state-mandated ratios in the classrooms, parents occasionally had to wait until additional staff arrived to drop off their children. On Wednesday August 10, claimant was fifteen minutes late to work because her brother had one of her children's car seats in his car. He had taken her daughter somewhere a day or so previously, and when he dropped her daughter off at home, claimant forgot to get the car seat back from him. On Wednesday June 1, claimant was fifteen minutes late to work due to a daycare issue.

Claimant had received multiple warnings related to her late arrivals. On June 16, the employer issued claimant a documented verbal warning for her late arrival on June 1. (Exhibit 3, page 5) On August 16, the employer issued claimant a documented verbal warning for her late arrival on August 10. (Exhibit 3, page 7) On September 16, the employer issued claimant a documented verbal warning for her late arrivals on September 7 and September 14. (Exhibit 3, page 9)

On September 30, the employer issued claimant a written warning for her late arrivals on September 21 and September 22. (Exhibit 3, page 10) The Staff Intervention Form that documented this disciplinary action states, "Further instances of being late for shifts will result in further intervention up to suspension or termination of employment." (Exhibit 3, page 10) Claimant signed this document on September 30.

On December 1, the employer issued claimant a disciplinary one-day suspension for her late arrival on November 29. (Exhibit 3, page 12) The Staff Intervention Form that documented this disciplinary suspension states, "Further instances of being late for shifts will result in further intervention up to termination of employment." (Exhibit 3, page 12) Claimant signed this document but did not date it. Claimant served her one-day suspension on December 14, 2022.

On December 30, the employer issued claimant a disciplinary two-day suspension for her late arrival on December 20. (Exhibit 3, page 13) The Staff Intervention Form that documented this disciplinary suspension outlines claimant's ongoing issues with tardiness, her prior disciplinary suspension, and her most recent late arrival on December 20. (Exhibit 3, page 13) It then states: "Further instances of being late to work shifts between now and February 28, 2023 will result in termination of employment." (Exhibit 3, page 13) Claimant and Lemen both signed this document on December 30, 2022. Before the employer had time to establish dates for claimant to serve her two-day suspension, claimant was late on January 4, 2023.

The employer has an attendance policy included in its employee handbook. Claimant received an employee handbook at the time she was hired and signed a document indicating she would read it and familiarize herself with its contents. (Exhibit 2) Lemen explained that good attendance is important to the services that the employer provides its clients. Claimant's late arrivals had a negative impact on providing continuity of care and consistency for persons with disabilities (the employer's consumers). Additionally, claimant's tardiness had an adverse affect on any staff member she was relieving when she arrived at work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying tardiness in reporting to work. Benefits must be denied.

Iowa Code section 96.5(2)(a) and (d)(9) provide:

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.

...

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following: ...

(9) Excessive unexcused tardiness or absenteeism.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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, either full-day absences or incidents of tardiness, 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). 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); 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 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, issues with childcare arrangements, 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). When no excuse is given for an absence at the time of the absence and no reason is given in the record, an absence is deemed unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984). See also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

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.*

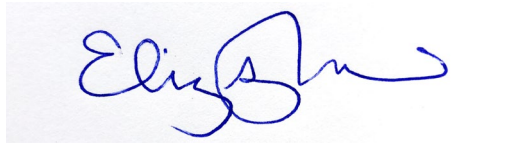
The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I found Lemen's testimony credible that he spoke directly with Jennifer, claimant's supervisor, and learned that claimant had been late to work on January 4, 2023. I do not believe that claimant arrived on time that day, and I do not believe that a resident of the duplex called and falsely reported that claimant had not arrived. The fact that January 4 was a Wednesday, the day of the week that claimant routinely struggled to come to work on time, lends further credibility to Lemen's testimony.

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 unexcused late arrivals could result in termination of employment. Claimant's final late arrival on January 4, 2023 was

neither properly reported to the employer nor excused. The final late arrival, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The January 30, 2023 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. 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

February 28, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.