

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICIA K DYER
Claimant

IOWA PHYSICIANS CLINIC MEDICAL
Employer

APPEAL 17A-UI-07975-DL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

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

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 31, 2017, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on August 24, 2017. Claimant participated. Employer participated through human resources business partner Susan Mikles and coding manager Theresa Spear. Employer's Exhibits 1 through 6 were received. Claimant's Exhibit A was received.

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 as a full-time clinical auditory lead from 1994, through July 12, 2017. She was discharged for three distinct reasons. Most recently, she had missed work during the last week of June and was in the process of completing an application for Family and Medical Leave Act (FMLA) leave. She returned to work July 3 and left early due to illness before reporting her final absence on July 5, due to illness. Because the employer said she would have been discharged based upon this reason alone, even if the other allegations were not considered, this is treated as the most recent, final or current act of alleged misconduct.

The next most recent even was on June 26 when the employer alleged claimant was not prepared to present on a specific topic at state-wide conference. Spear assigned the topic the previous Thursday, June 22, during a disciplinary meeting. This was the first presentation request of claimant who was unclear about the direction and asked for clarification. Spear gave further instruction that she did not want other auditors to know about others' reports. Claimant did not have access to certain data bases required. The employer also noted that while at the head of a u-shaped table, claimant had her head back, eyes closed and appeared to be sleeping or disengaged. Claimant was undergoing a medication regimen adjustment and does not recall that scenario. The employer did not attempt to alert her or check on her well-being. She had no prior warnings for similar issues.

Most remotely in time on June 22, she left the office unsecured. Mikles arrived early for a meeting regarding performance and was in the office for about five minutes before anyone arrived. Claimant was outside on break having a cigarette and saw Mikles arrive. She finished her break early and went inside. From her vantage point she was able to see anyone entering the office. Claimant had been warned on June 22, 2017, about leaving the office unlocked on April 20, 2017, after she had a panic attack and left the office unlocked when she went home.

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:

Causes for disqualification.

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.

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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.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be

considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. ____, (Iowa Ct. App. filed ____, 1986).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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*, supra.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Because her last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents of absenteeism need not be examined. The analysis of the separation would usually end with the final incident and any related history, but the ALJ will, for the purpose of explanation only, review the other two stated reasons for the separation.

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to

warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits.” (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The incidents regarding her performance at the meeting on June 26 was a combination of miscommunication errors and medication side-effects and were not because of any deliberate conduct, omission or negligence in breach of the employer’s interests. Further, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for attendance or office security is not similar to an allegation of sleeping on the job or poor job performance or errors, and the employer’s simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

Finally, the discharge reason related to the unlocked door was not based in fact and the claimant was still on the premises and could see the door from her break area. This situation is distinguishable from the earlier warning when she left the office unlocked and left the premises to go home due to a medical emergency. Neither of these oldest two scenarios would be considered a current act of alleged misconduct due to the delay between the incident and discharge dates. Accordingly, claimant is not disqualified from benefits for any of the reasons presented by the employer.

DECISION:

The July 31, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs