

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TOD J MERRIFIELD

Claimant

WELLS FARGO BANK NA

Employer

APPEAL 19A-UI-06469-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/14/19

Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – DM – Excessive unexcused absenteeism

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the August 5, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on September 9, 2019, at 9:00 a.m. Claimant participated. Employer participated through Karel Clark, Hearing Representative, and Jim Kerschke, Contact Center Manager. Claimant's Exhibits A – M were admitted. Employer's Exhibit 1 was admitted.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an inbound sales specialist from October 7, 2015 until his employment with Wells Fargo Bank ended on July 2, 2019. (Kerschke Testimony) Claimant's work schedule was Monday through Friday from 7:30 a.m. until 4:00 p.m. and every third Saturday from 8:00 a.m. until 4:30 p.m. (Kerschke Testimony) Claimant's direct supervisor was Genya Tolmatsky, Contact Center Manager, (Kerschke Testimony)

Employer has an attendance policy that outlines progressive discipline for arriving late to work or from a break or meal period. (Exhibit 1, p. 3-4) The policy requires employees to notify their managers prior to the beginning of their shift, if they are going to be late or absent from work. (Exhibit 1, p. 4) The policy is included in the employee handbook. (Kerschke Testimony) Claimant received a copy of the handbook. (Kerschke Testimony)

On March 19, 2019, claimant received an informal warning for excessive tardiness. (Exhibit 1, p. 6) The warning states that another tardy occurrence may lead to further corrective action up to and including termination. (Exhibit 1, p. 6) On April 23, 2019, claimant arrived at work at 7:53 a.m. (Kerschke Testimony) Claimant did not provide a reason for his tardiness but notified employer that he would be late to work. (Claimant Testimony) On April 24, 2019, claimant received a formal warning for excessive tardiness. (Exhibit 1, p. 5) The warning states that

another tardy occurrence may lead to further corrective action up to and including termination. (Exhibit 1, p. 5) On May 14, 2019, claimant arrived at work at 7:35 a.m. (Claimant Testimony) Claimant was tardy due to parking at the workplace. (Claimant Testimony) Also on May 14, 2019, claimant returned from his lunch break 11 minutes late. (Kerschke Testimony) Claimant was tardy because he was scheduling a medical appointment for his child. (Claimant Testimony) Claimant did not notify employer that he would be late returning from lunch. (Claimant Testimony) On June 17, 2019, claimant returned from his lunch break seven minutes late. (Kerschke Testimony) Claimant was tardy because he was obtaining medical test results and scheduling a medical appointment. (Claimant Testimony) Claimant did not inform employer that he would be late returning from lunch. (Claimant Testimony) On June 18, 2019, claimant arrived at work three to four minutes late due to road construction and parking at the workplace. (Claimant Testimony) Claimant did not provide employer with notice that he would be tardy. (Claimant Testimony) On June 28, 2019, claimant arrived to work six minutes after the beginning of his shift and 8 minutes late from his lunch break. (Kerschke Testimony) Claimant was late both times because he was attending to personal affairs. (Claimant Testimony) Claimant told his manager the day before that he may be late to work. (Claimant Testimony) Claimant did not inform his manager on June 28, 2019 either before his shift began or while on his lunch break that he would, in fact, be tardy. (Claimant Testimony)

Employer terminated claimant's employment on July 2, 2019 for excessive tardiness. (Kerschke Testimony) Employer provided claimant with Family Medical Leave Act (FMLA) forms to complete in May 2019; however, claimant did not submit the completed forms to employer until September 4, 2019. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged due to disqualifying job-related misconduct. Benefits are denied.

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 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(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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.

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.

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.

Excessive absences are not considered misconduct unless unexcused. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Claimant did not provide a reason for his absence on April 23, 2019; therefore, it is unexcused. Claimant's absences on June 18, 2019 and May 14, 2019 were due to road construction and parking, which are not reasonable grounds for absence. Therefore, the absences are unexcused. Claimant's absences on May 14, 2019 and June 17, 2019 were due to claimant scheduling medical appointments, a volitional act of personal responsibility, which is not reasonable grounds for absence. Furthermore, claimant did not provide employer with notice of the absences. Therefore, the absences are unexcused. Claimant's absences on June 28, 2019 were to pick up medical equipment, a volitional act of personal responsibility, which is not reasonable grounds for absence. Furthermore, claimant telling his supervisor that he may be late the following day is not sufficient notice. Claimant's absences on June 28, 2019 are unexcused. Claimant accrued seven absences in approximately two months; six of the absences occurred after claimant received a formal warning stating that further absences would place his employment in jeopardy. Claimant's unexcused absenteeism is excessive and constitutes disqualifying job-related misconduct. Benefits are denied.

DECISION:

The August 5, 2019 (reference 01) unemployment insurance decision is affirmed. Benefits are denied.

Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/scn