

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

SEJLA OMEROVIC

Claimant

MERCY HELATH SERVICES – IOWA CORP

Employer

APPEAL 22A-UI-18550-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/09/22

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

On November 3, 2022, Sejla Omerovic (claimant) filed an appeal from the October 27, 2022, reference 01, unemployment insurance decision that denied benefits based upon the determination Mercy Health Services – Iowa Corp. (employer) discharged them for dishonesty. The parties were properly notified about the hearing held by telephone on November 28, 2022. The claimant participated personally. The employer participated through Holly Burtness, Human Resource Specialist, and was represented by Michael Baughman. The employer's Exhibits 1, 2, and 5 were admitted into the record without objection. The employer's Exhibits 3 and 4 were not admitted into the record as the foundation for the documents could not be established.

ISSUE:

Did the employer discharge the claimant for job related misconduct?

FINDINGS OF FACT:

Having reviewed all the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Respiratory Therapist beginning on July 8, 2018, and was separated from employment on October 7, 2022, when they were discharged. The employer has an attendance policy and a progressive disciplinary process of which the claimant was aware.

On April 28, 2022, the claimant received a verbal counseling related to attendance.¹ She acknowledged receiving it. The employer warned the claimant that a written warning would be the next step if their attendance did not improve. The same day, the employer also issued a "1st

¹ Exhibit 1

Warning” to the claimant for failure to properly use badge access.² The employer’s disciplinary process is included at the top of the warning and includes three warnings and a warning with suspension before termination.

On September 16, the claimant left the shift as it appeared someone was in their house at 3:00 a.m. while they were working. They left one employee and did not clock out but they returned approximately one hour later. On September 20, the claimant was late to work because they spilled something while driving to work and needed to go home to change. On September 21, the employer had a conversation with the claimant about attendance but did not record the conversation like the previous verbal counseling.

On October 4, the claimant left the facility to go to lunch but forgot to clock out. The employer discharged the claimant for violation of the attendance policy. The claimant did not receive any written warnings related to attendance and did not know their job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the following reasons, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2) provides, in relevant part:

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. 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:

...

² Exhibit 2.

(9) Excessive unexcused tardiness or absenteeism.

Iowa Admin. Code r. 871-24.32 provides, in relevant part:

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.

...

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

...

(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.

(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 be based on a current act.

The Supreme Court has held that this definition of misconduct accurately reflects the definition of the legislature.³

³ *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. As the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.⁴ The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits.⁵ What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions.⁶

The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability.⁷ Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer, and is considered misconduct *except for illness or other reasonable grounds* for which the employee was absent and that were properly reported to the employer.⁸ An employer's attendance policy does not control whether the separation qualifies the claimant for unemployment insurance benefits.

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive.⁹ The term "absenteeism" includes tardiness or leaving work early. An absence is an extended tardiness, and an incident of tardiness is a limited absence. Whether an absence is excessive requires consideration of past acts and warnings.¹⁰

Second, the absences must be unexcused.¹¹ The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused because it was not for "reasonable grounds,¹²" or because it was not "properly reported," holding excused absences are those "with appropriate notice.¹³" Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused.¹⁴

⁴ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

⁵ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁶ *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

⁷ *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

⁸ 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."

⁹ *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).

¹⁰ *Higgins* at 192.

¹¹ *Cosper* at 10.

¹² *Higgins* at 191.

¹³ *Cosper* at 10.

¹⁴ *Higgins, supra.*

As the employer had not put the claimant on notice that they were in danger of losing their job due to absenteeism, it has not met the burden of proof to establish that the 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. Benefits are allowed.

DECISION:

The October 27, 2022, 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. Any benefits claimed and withheld on this basis, shall be paid.



Stephanie R. Callahan
Administrative Law Judge

December 7, 2022
Decision Dated and Mailed

src/mh

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.