

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**TINA GUNN**  
Claimant

**DOLLAR TREE STORES INC**  
Employer

**APPEAL 16A-UI-05511-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/10/16**  
**Claimant: Appellant (2-R)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism  
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 12, 2016, (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant. The parties were properly notified of the hearing. A telephone hearing was held on June 1, 2016. The claimant, Tina Gunn, participated. The employer, Dollar Tree Stores, Inc., participated through Carrie Donoso, store manager.

**ISSUE:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a cashier from November 2014, until this employment ended on February 28, 2016, when she was discharged.

Claimant last worked on February 24, 2016. She was scheduled for shifts on February 25, 26, and 27, but she neither came to work nor called the employer to report that she would not be there for those three shifts. Claimant was diagnosed with a kidney infection and had emergency surgery on approximately February 25, 2016. On February 27 or 28, claimant told Sandy, one of the employer's managers, that she had this infection. Claimant asked Sandy to let Donoso know that she was in the hospital and could not report to work. Claimant has been in the hospital since February. She hopes to be out of the hospital at the end of June or the beginning of July.

Donoso testified that employees are informed they must directly call the store's telephone and report any absences. Claimant never received an employee handbook, and she was not aware that she was not allowed to text Sandy and ask her to pass on that she was in the hospital and

would be absent from work. Donoso heard from Sandy both that claimant had surgery and that she had moved back to Chicago. Donoso heard both of these updates prior to March 9, 2016, when Sandy was discharged.

Donoso testified the employer has a policy that two no-call/no-shows will result in automatic discharge. While claimant had three no-call/no-shows, Donoso kept her on the schedule through the following week because she did not know what was going on with claimant.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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(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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); see also Iowa Admin. Code r. 871-24.25(35). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Here, claimant had no intention of ending her employment. She was not able to report to work because she had emergency surgery and was instructed by her treating physician to remain in the hospital. The testimony taken during the hearing shows the employer, not claimant, ended claimant's employment. Therefore, this case will be analyzed as a discharge from employment and the employer bears the burden of showing claimant was discharged for job-related misconduct.

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. See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

The testimony taken during the hearing does not clearly establish claimant was required to call the employer's store telephone in order to report her absence. While Donoso testified this was the policy, claimant testified she was not aware of this, and no written policy was submitted as an exhibit by either party. Even if this was the policy, claimant was in the hospital having and recovering from emergency surgery during the scheduled shifts she missed. She reached out to Sandy via text message and told her that she had surgery, and she believed Sandy would notify Donoso. Claimant acted reasonably in light of her medical situation and attempted to notify her employer about the cause of her absences. Additionally, Donoso admits Sandy told her that claimant had surgery and Donoso never attempted to reach out to claimant to offer FMLA or inquire about claimant's estimated return-to-work date. As claimant's absence was related to illness that she attempted to report to the employer, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

**DECISION:**

The May 12, 2016, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

**REMAND:**

The issue of whether claimant is able to and available for work is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Elizabeth Johnson  
Administrative Law Judge

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Decision Dated and Mailed

lj/pjs