

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ANGELA GUERRA

Claimant

APPEAL NO. 14A-UI-02995-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

OC: 02/23/14

Claimant: Appellant (2)

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Angela Guerra (claimant) appealed an unemployment insurance decision dated March 12, 2014, (reference 01), which held that she was not eligible for unemployment insurance benefits because she was discharged from Tyson Fresh Meats, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 10, 2014. The claimant participated in the hearing with Attorney Mary Hamilton. Ike Rocha interpreted on behalf of the claimant. The employer participated through Will Sager, Human Resources Manager. Employer's Exhibits One through Four and Claimant's Exhibit A were admitted into evidence.

ISSUE:

The issue is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked as a full-time production worker and was employed from June 10, 2013, through February 21, 2014. She was discharged from employment due to violation of the employer's attendance policy with a final incident on February 17, 2014, when she was four minutes late for work.

The employer has an attendance point system in which employees are terminated after accumulating ten points. As of September 29, 2013, the employer's attendance policy began to assess points for a medical leave of absence if it was not excused in advance or not covered by the Family Medical Leave Act (FMLA). The claimant was warned regarding attendance on December 9, 2013, when she had three points. These points were assessed for an excused medical absence from November 11, 2013, through November 25, 2013, but one which was not covered by FMLA. In October 2013, the claimant reported a male co-worker was sexually harassing her and it caused a lot of anxiety. The allegation was investigated but not substantiated.

Another incident occurred on January 9, 2014, and the claimant reported it but was told the case had already been investigated. She accrued three additional points on January 10, 2014, when she was a no-call/no-show. The claimant was actually admitted to the hospital by court order on that date after a suicide attempt and was not medically able to report her absence. She was medically released to return to work on January 29, 2014. Three additional points were assessed for the claimant's medically excused leave of absence from January 11, 2014, through January 28, 2014.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on February 21, 2014, for 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. 871 IAC 24.32(7).

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 897 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds", *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not "properly reported". *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982) (excused absences are those "with appropriate notice"). The determination of whether an absence is unexcused does not turn on requirements imposed by the employer. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007).

In the case herein, all but two of the claimant's absences were excused by the employer. Of the remaining two, one was a no-call/no-show on the day she was admitted to the hospital after a suicide attempt. However, unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. See *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984). The claimant was unable to report her absence on January 10, 2014, so that leaves one unexcused absence and a single unexcused absence does not constitute excessive unexcused absenteeism. *Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). Consequently, work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated March 12, 2014, (reference 01), is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css