

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BRENDA L OSTEEN**  
Claimant

**TYSON PET PRODUCTS INC**  
Employer

**APPEAL 15A-UI-04774-EC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/22/15**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant/appellant, Brenda Osteen, filed an appeal from the April 16, 2015, (reference 01) unemployment insurance decision that denied benefits based upon her discharge following her violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on June 2, 2015. The claimant participated. The employer participated through Dakota Cunningham, HR Clerk and Benefits Counselor. The employer submitted exhibits which were labeled collectively as Exhibit E and numbered Exhibit E1-E9. These exhibits were admitted into the record without objection.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as an oven assistant, from February 19, 2014, until her employment was terminated on March 20, 2015. Her regular work schedule in the oven assistant position was 6:00 a.m. to 2:30 p.m. She previously worked for this employer, in packaging, from November 18, 2013 until February 18, 2014. Her regular work schedule in the packaging position was 6:30 a.m. to 3:00 p.m.

Her employment was terminated after she exceeded the maximum 14 points allowed during a rolling calendar year under the employer's attendance policy. She accumulated 15 points as of March 18, 2015.

The claimant understood the employer's attendance point system. She checked in often to verify the number of points she had accumulated. (Osteen testimony) The employer's accountant sends notifications to employees when that employee reaches certain point markers on the rolling calendar year basis. (Cunningham testimony) The claimant received six of these notices. (Exhibit E4-E9) The claimant received a notice on February 27, 2015, when she accumulated 12 points. (Exhibit E4) The claimant received a notice on February 11, 2015,

when she accumulated 12 points. (Exhibit E5) The claimant received a notice on January 29, 2015, when she accumulated 12 points. (Exhibit E6) The claimant received a notice on August 20, 2014, when she accumulated 8.5 points. (Exhibit E7) The claimant received a notice on June 2, 2014, when she accumulated 2.5 points. (Exhibit E8) The claimant received the first notice on January 2, 2014, when she accumulated 2.5 points during her probationary period. (Exhibit E9) This notice also stated, "Cannot go over 5 points in probation period." (Exhibit E9)

According to the claimant, no points were assessed if she provided appropriate documentation to show the reason for her absence or tardiness. She believed that she would have additional time to provide documentation to show why she was absent or tardy on March 18, 2015. She was not provided this opportunity. Instead, she learned that her employment was terminated when she called her employer's HR representative on March 20, 2015. The claimant did not receive a written termination notice from this employer. (Osteen testimony)

On March 18, 2015, the claimant knew that she would be late for her scheduled shift. She needed to take her children to school that morning at 8:15 am. Her boyfriend usually took them, but he could not do so on that morning. He was incarcerated for driving without a license. She initially tried to call in to her employer on her daughter's cell phone, which had spotty service. She could not get through to use the employer's call-in system. She contacted her supervisor through Facebook. Then, she finally got through on the employer's call-in system, at 6:13 a.m., after she was scheduled to begin working. She eventually arrived and worked from 8:30 a.m. to 12:30 p.m. She was called to the office and met with the plant manager. She was sent home and told that HR would decide what to do. (Osteen testimony)

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct.

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(1)a provides:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

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.

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).

As stated above, the employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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 attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Properly reported absences related to illness or injury are excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without prior notification to the employer is generally considered an unexcused absence.

An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The employer has credibly established that the claimant was warned, repeatedly, that additional unexcused absences could result in termination of employment. The final absence was not excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are denied.

**DECISION:**

The April 16, 2015, (reference 01) decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Emily Gould Chafa  
Administrative Law Judge

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Decision Dated and Mailed

ec/css