

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MATTHEW WINTERS

Claimant

APPEAL 19A-UI-06167-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

COGNIZANT TECHNOLOGY SOLUTIONS

Employer

OC: 07/07/19

Claimant: Appellant (2)

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

Iowa Code § 96.4(3) – Eligibility – Ability to and Availability for Work

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the July 24, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 27, 2019, at 2:00 p.m. Claimant participated. Employer participated through Lori Bryant, Human Resources Business Partner. No exhibits were admitted.

ISSUES:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.
Whether claimant is able to and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a senior process executive from January 21, 2019 until his employment with Cognizant Technology Solutions ended on June 27, 2019. (Bryant Testimony) Claimant's job entailed performing customer service work via telephone while seated at a desk. (Claimant Testimony)

Employer has an attendance policy that outlines progressive discipline imposed for unscheduled, unapproved absences. (Bryant Testimony) The policy further provides that employees are to notify employer of an absence 48 hours in advance by calling their manager. (Bryant Testimony) The policy is outlined in the employee handbook; claimant received a copy of the handbook. (Bryant Testimony)

Claimant ruptured his Achilles tendon over Memorial Day weekend (May 25-27, 2019). (Claimant Testimony) Claimant received medical care the same day of the injury. (Claimant Testimony) Claimant was instructed by a physician that his injury required surgery, that claimant could not return to work prior to the surgery and that claimant would be on bed rest for three to four weeks after surgery. (Claimant Testimony) On May 28, 2019, claimant informed his manager of his injury and when he expected to return to work via telephone and email. (Claimant Testimony) Claimant submitted a leave of absence request to employer. (Claimant

Testimony) Employer responded by requesting medical documentation of the injury. (Bryant Testimony) Claimant was unable to obtain the documentation employer requested because it was not yet available from the provider. (Claimant Testimony) Claimant informed employer that he was unable to get the requested documentation and the reason why. (Claimant Testimony) Claimant had surgery on June 4, 2019 and was on bed rest until June 26, 2019. (Claimant Testimony) Claimant and employer scheduled to meet on June 27, 2019 to discuss when claimant would be able to return to work. (Claimant Testimony) At the meeting on June 27, 2019, employer terminated claimant's employment due to excessive absenteeism. (Bryant Testimony)

As of June 27, 2019, claimant was no longer on bed rest or taking medication and was fitted with an orthopedic boot. (Claimant Testimony) Claimant was able to perform customer service job duties as of June 27, 2019. (Claimant Testimony) Claimant had customer service experience. (Claimant Testimony) Claimant applied for customer service and call center positions through temporary staffing agencies. (Claimant Testimony) Claimant had no other barriers to employment. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

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 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. 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.

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. FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee.

It is the duty of the administrative law judge, as the trier of fact, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence,

memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the claimant's testimony regarding his final absence and his ability to and availability for work to be credible.

Claimant's absence from May 28, 2019 through June 27, 2019 was due to an injury; it was not volitional. Medical documentation is not required. Claimant's absence was for reasonable grounds. Claimant reported his absence to employer as soon as possible and in the manner outlined by employer's policy. Claimant's absence was properly reported. Therefore, the absence was excused and does not constitute misconduct. Without a current or final act of misconduct, the history of other absences need not be examined. Claimant was discharged for no disqualifying reason. Benefits are allowed if claimant is otherwise eligible.

For the reasons that follow, the administrative law judge concludes the claimant has been able to and available for work since filing his original claim on July 7, 2019.

Iowa Code section 96.4(3) provides: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that . . . [t]he individual is able to work, is available for work, and is earnestly and actively seeking work."

Iowa Admin. Code r. 871-24.22 provides, in pertinent part:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. *Illness, injury or pregnancy.* Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23 provides that an individual who is ill and presently not able to perform work due to illness is disqualified for being unavailable for work.

As of June 27, 2019, claimant had completed his bed rest, was no longer taking medication for his injury and had no other barriers to employment. Claimant has met his burden of proving that he has been able to and available for work since filing his original claim on July 7, 2019.

DECISION:

The July 24, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Claimant has been able to and available for work since filing his original claim on July 7, 2019. Benefits are allowed provided claimant is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs