

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

COURTNEY LIVINGSTON
Claimant

**GOVERNMENT EMPLOYEES INSURANCE
COMPANY**
Employer

APPEAL 21A-UI-02654-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/27/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Claimant filed an appeal from the January 5, 2021, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 9, 2021. The claimant participated personally. The employer participated through Tom Kuiper, hearing representative with Equifax Workforce Solutions/Talx. Amanda Sanford and Colin Platts testified. Debra Mienke-Pence attended as an observer. The administrative law judge took official notice of the administrative record. Claimant Exhibit A was admitted.

ISSUE:

Was the claimant discharged for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant worked for this employer as a full-time customer service representative. Claimant was trained on employer rules and procedures at the time of hire. Employer's policy requires employees notify management prior to management if they cannot work. Employer stated that three unscheduled absences in six months can lead to discharge or separation. Claimant was issued a verbal warning and memo about her attendance history, prior to the final incident. With the exception of September 26, 2020, claimant had properly reported her absences in accordance with the employer's policy.

The employer stated claimant last performed work on September 28, 2020 but was absent for her shifts on September 25, and 26, 2020. Claimant left her shift early on September 25, 2020 when she had to pick her child up at daycare after a biting incident.

The evidence is disputed as to whether claimant was scheduled to work on Saturday, September 26, 2020. Employer stated claimant was hired to work every third Saturday. Employer presented no documentation for the hearing, but stated claimant last worked a partial shift on Saturday, September 12, 2020 before leaving early. Claimant stated her last Saturday shift was August 22, 2020. Using either claimant's date or employer's date as the counting

point for the next “third” Saturday, neither would have had claimant scheduled for Saturday, September 26, 2020.

In addition to absences not counted towards consideration of discharge (such as September 12, 22 and 23, 2020), employer considered the following absences:

April 28, 2020	Left early, illness
April 30, 2020	Absent, illness
May 1, 2020	Absent, illness
May 4, 2020	Absent, illness
July 16, 2020	Absent, illness
July 17, 2020	Absent, illness
July 18, 2020	Absent, illness
July 20, 2020	Absent, illness
July 21, 2020	Left early, illness
September 25, 2020	Left early to pick up child from daycare
September 26, 2020*	No call/no show

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment but not due to job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

“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).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“rule [2]4.32(7)...accurately states the law”).

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 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. The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

The first issue to address is whether claimant’s absence on September 26, 2020 can be counted towards a finding of excessive absences.

Iowa Admin. Code r. 871-24.32(4) provides:

(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.

The credible evidence presented does not support claimant was scheduled to work on September 26, 2020. Employer presented no calendar, schedule or reasonable notice that would support claimant being scheduled to work on September 26, 2020. Per employer’s own policy, if claimant was scheduled to work every third Saturday, and last performed work partially on September 12, 2020, her next scheduled Saturday would not have been until October 3, 2020. Claimant credibly denied being scheduled on September 26, 2020. Therefore, the administrative law judge concludes the claimant’s absence on September 26, 2020 cannot be considered as an unexcused absence inasmuch as she was not scheduled to work that day.

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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.

All absences except the claimant’s absence on September 25, 2020 were due to illness and properly reported. Absences due to properly reported illness are excused, 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*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. Therefore, claimant had one unexcused absence.

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. Claimant's sole unexcused absence was September 25, 2020. Because her absences were otherwise related to properly reported illness or other reasonable grounds, (regardless of employer policy) the employer has failed to establish claimant had excessive, unexcused absences, according to Iowa law. Benefits are allowed, provided she is otherwise eligible.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The January 5, 2021, (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged but for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.



Jennifer L. Beckman
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March 11, 2021
Decision Dated and Mailed

jlb/lj