

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**MICHELLE M MANN**  
Claimant

**APPEAL NO: 18R-UI-05472-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE HILLSHIRE BRANDS COMPANY**  
Employer

**OC: 02/04/18**  
**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:**

The claimant filed an appeal from the March 13, 2018, (reference 01) unemployment insurance decision that denied benefits based upon separation. A first hearing was scheduled between the parties on April 12, 2018. The claimant/appellant failed to appear at the hearing, and the appeal was dismissed. Upon a remand decision from the Employment Appeal Board, the appellant's request to reopen the hearing was granted.

The parties were properly notified about the second hearing. A telephone hearing was held on May 31, 2018. The hearing was held jointly with Appeal 18A-UI-05473-JC-T. The claimant participated personally. Justin Mann, husband, attended as a witness/representative. Jered Dewbre, brother-in-law and co-worker of claimant, was listed as a witness but unavailable when called. The employer participated through Yamilex Iracheta, human resources generalist.

Employer Exhibits 1-27, and Claimant Exhibit A were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**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: The claimant was employed full-time as a white meat/breast remover and was separated from employment on January 11, 2018, when she was discharged for excessive absenteeism (Employer Exhibit 11).

The employer utilizes a point system to designate point values for absences and late arrivals (Employer Exhibit 1-10). Employees incur additional points when they do not properly call the

attendance line within 30 minutes of their start time. Employees began with 48 points and were subject to discharge at 0 points, as points were deducted with each absence or tardy. Employees could also earn back points deducted for every two week period that they had perfect attendance. The claimant was trained on the employer's attendance policy at hire (Employer Exhibit 24, 25, 26, 27). Prior to discharge, the claimant had received three written warnings for her attendance on November 8, 2017 (Employer Exhibit 15, 16, 17, 18), November 21, 2017 (Employer Exhibit 19, 20) and December 27, 2017 (Employer Exhibit 21, 22, 23).

The claimant's absences and tardies were all properly reported on September 7, 8, 21, 25, October 11, 24, 30, November 14, 17, 2017. The reasons varied from back pain, having marital issues, to feeling bullied in the work place to unknown reasons. The undisputed evidence is the claimant was discharged after properly reporting her absence on January 10, 2018, causing her to have an attendance point balance of 0. The claimant did not disclose on the attendance hotline the reason for her absence on January 10, 2018, but did tell the human resources associate the next day that she had been sexually assaulted, which prevented her from working her shift. She followed up with law enforcement approximately two to three weeks after the incident. While the employer's policy does allow discretion in giving back points, as had been done for the claimant's brother-in-law, a fellow employee, she was not allowed to take an unpaid day or be given points back to cover her final absence, and was subsequently discharged.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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(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). 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) (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. 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*.

It is the duty of the administrative law judge as the trier of fact in this case, 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 believable evidence; 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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. The claimant's final absence on January 10, 2018, was properly reported by calling the attendance line. The reason was not for illness, but the administrative law judge is persuaded that the claimant's absence after being sexually assaulted the same day would be considered "reasonable grounds" for calling off work. It would therefore be considered excused for unemployment insurance purposes. The administrative law judge is persuaded the claimant

did not intend to miss work or plan to miss work on January 10, 2018; her absence was due to unplanned and unforeseen circumstance.

Based on the evidence presented, the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or “other reasonable grounds”, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

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 to separation was misconduct under Iowa law.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

**DECISION:**

The March 13, 2018, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn