

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LAVENDER E BELINSKY
Claimant

APPEAL 18A-UI-09882-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONSUMER SAFETY TECHNOLOGY LLC
Employer

**OC: 09/02/18
Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Discharge for Misconduct
Iowa Admin Code r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Lavender Belinsky, Claimant, filed an appeal from the September 21, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with Consumer Safety Technology, LLC due to excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on October 11, 2018 at 1:00 p.m. Claimant participated. Employer participated through Samantha Stupka, Human Resources Business Partner, and Robert Last, Sales Supervisor. Claimant's Exhibit A was admitted.

ISSUE:

Whether Claimant's separation was a discharge for disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a sales associate from August 15, 2012 until her employment ended on September 4, 2018. (Stupka Testimony) Claimant's schedule was Monday through Friday from 8:00 a.m. until 12:00 noon and one Saturday per month. (Stupka Testimony) Claimant's direct supervisor was Robert Last. (Stupka Testimony)

The employer has a points-based attendance policy. (Stupka Testimony) The policy requires employees to call the attendance line and leave a voicemail message if they will be absent or tardy. (Stupka Testimony) The policy does not state that the employees must call within a certain period of the beginning of their shift. (Stupka Testimony) Claimant received a final written warning for absenteeism on August 20, 2018 that stated any further infractions could result in disciplinary action, up to and including termination. (Stupka Testimony) Claimant received a copy of the final written warning. (Claimant Testimony)

After the final written warning was issued, claimant was absent on the following occasions:

- On August 23, 2018, claimant was absent due to illness. (Claimant Testimony)
Claimant did not notify her employer. (Stupka Testimony)

- On August 24, 2018, claimant was absent due to illness. (Claimant Testimony) Claimant notified her employer by calling the attendance line and leaving a voicemail message at 12:01 p.m. (Stupka Testimony)
- On August 27, 2018, claimant was absent due to illness. (Claimant Testimony) Claimant notified her employer by calling the attendance line and leaving a voicemail message at 9:44 a.m. (Stupka Testimony)
- On August 28, 2018, August 30, 2018 and August 31, 2018, claimant was absent due to illness. (Claimant Testimony) Claimant did not notify her employer. (Stupka Testimony)

On September 4, 2018, claimant was discharged from employment by her direct supervisor via telephone call. (Stupka Testimony) The reason given for termination was excessive absenteeism. (Stupka Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper*, 321 N.W.2d at 11. 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. 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. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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.

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. See *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).

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.*

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 Employer's version of events to be more credible than the Claimant's recollection of those events. Claimant alleges that she called the attendance line every day that she was absent and left a voicemail message, but could not provide the times of her calls. (Claimant Testimony) Employer testified to each voicemail message it received from claimant on the attendance line, the time of the call and the reason, if any, claimant stated for her absence. The information employer provided was specific and was not refuted by claimant when it supported her position. Furthermore, some of the information employer provided was adverse to its position.

Claimant accrued six absences in nine days after receiving a final written warning. Claimant's absences were due to illness, which is a reasonable basis for absence from work. However, claimant did not notify her employer of four of these absences. Because the absences were not properly reported, they are unexcused. Claimant's four unexcused absences after receiving a final written warning are excessive and constitute job-related misconduct. Claimant is disqualified for benefits.

DECISION:

The September 21, 2018, (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/rvs