

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LACRISSHA A WHITESIDE
Claimant

PEOPLEREADY INC
Employer

APPEAL 20A-UI-04052-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

On May 15, 2020, the claimant filed an appeal from the April 14, 2020, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on June 1, 2020. Claimant participated. Employer did not register for the hearing and did not participate. Department Exhibit 1 was received.

ISSUES:

Is the appeal timely?
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: On April 14, 2020, Iowa Workforce Development mailed claimant a reference 01 unemployment insurance decision denying benefits. Claimant received the decision one or two days later.

On April 15, 2020, Iowa Workforce Development mailed claimant a reference 03 unemployment insurance decision allowing benefits based on a separation from employment with a different employer.

Iowa Workforce Development did NOT send a summary decision, as it typically would in this situation, explaining that each protest is decided separately and that ultimately claimant was denied benefits.

Having received the decision allowing benefits, claimant did indeed believe she was allowed benefits and continued to file her weekly claims for benefits.

On May 15, 2020, claimant went into her local office for advice because she still was not receiving benefit payments. At that time, it was explained to claimant that the decision denying

her benefits controlled and she would have to appeal it. Claimant filed her appeal the same day.

Employer is a temporary staffing agency. Employer last assigned claimant to work at Goodwill as a full-time warehouse employee until her assignment ended on March 3, 2020.

Employer does not have an attendance policy that claimant is aware of.

Claimant was absent for one day within the last week of her employment. Claimant was absent due to transportation. Claimant reported the absence online prior to the shift starting.

On March 3, 2020, when claimant logged in to employer's online portal, she was not able to view any open jobs. Claimant called employer and was informed she had been suspended for one year.

Prior the absence, employer had not disciplined claimant for attendance. Claimant did not believe her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

In this case, Iowa Workforce Development mailed claimant a decision allowing benefits directly after mailing the decision denying benefits. Claimant did not realize she needed to appeal the first decision and was not notified of that by Iowa Workforce Development. Without clear notice of a denial decision, claimant did not have a reasonable opportunity to file an appeal. When claimant realized she had been denied benefits, she filed an appeal immediately. The appeal should be accepted as timely.

The next issue is whether claimant's separation from employment disqualifies her from receiving unemployment insurance benefits.

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

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

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. 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. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

In this case, claimant's last absence is considered unexcused under the law. However, employer did not have an attendance policy claimant was aware of and had not previously warned claimant regarding her attendance. Therefore, employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Employer failed to establish claimant was terminated for misconduct. Benefits are allowed.

DECISION:

The April 14, 2020, (reference 01) unemployment insurance decision is reversed. The appeal is timely. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.



Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

June 22, 2020
Decision Dated and Mailed

cal/scn