

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LA'CRISSHA A WHITESIDE
Claimant

APPEAL 17R-UI-07773-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WHIRLPOOL CORPORATION
Employer

OC: 05/14/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 9, 2017, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on August 17, 2017. The claimant participated and testified. Brenda Cook also participated as a witness on behalf of the claimant. The employer did not participate.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an assembler from September 10, 2012, until this employment ended on September 21, 2016, when she was discharged.

Claimant was arrested and charged with an OWI 3rd Offense. Claimant testified she was not aware that drinking and driving could lead to incarceration or that being incarcerated may place her job in jeopardy. Claimant acknowledged she had incarcerated for two previous OWI offenses and was advised that incarceration for this offense was at least a possibility. Claimant also understood the employer's policy provides for termination after seven days of consecutive absences. Claimant ultimately pled guilty to this charge and was incarcerated from September 21, 2016 through May 15, 2017. For the first few weeks of her incarceration claimant's mother, Brenda Cook, would call each day and report to the employer that claimant would be absent from work. Claimant's mother continued to do this until she was notified by the employer that claimant had been separated from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 96.5(2)a provides:¹

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 individual shall be disqualified for benefits 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:

Discharge for misconduct.

(1) Definition.

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 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).

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.

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

¹ Iowa Code Section 96.5 was amended effective July 2, 2017 to specifically address separations involving incarceration. However, the claimant filed his claim for benefits on May 14, 2017, before the amendments went into effect.

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. 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 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The Iowa Supreme Court recently decided a case addressing a discharge for absences due to incarceration. “[I]nvoluntary incarceration, at least where the charges are dismissed, ... falls within the ‘other reasonable grounds’ for absence contemplated under rule 871—24.32(7).” *Irving v. E.A.B.*, 883 N.W.2d 179, 203 (Iowa 2016).

Here, claimant incurred several weeks of consecutive absences due to incarceration before being separated from employment. Unlike the claimant in *Irving*, however, claimant pled guilty to the charge for which she was incarcerated. Claimant contends she did not know drinking and driving could lead to incarceration or that incarceration could lead to her separation from employment. Claimant admitted, however, that she had been incarcerated for the same offense on two prior occasions and that she understood it was the employer's policies to separate individuals from employment after seven absences. It is reasonable to conclude that claimant acted voluntarily in a way that she knew, or reasonably should have known, would jeopardize her employment. While claimant's mother may have been properly reporting her absences for her, they are nevertheless attributable to issues of personal responsibility and therefore unexcused. Claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

DECISION:

The June 9, 2017, (reference 01) decision is affirmed. Claimant was discharged from employment for excessive unexcused absenteeism. Benefits are withheld until such time as the claimant works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs