

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**FLORINE MOORE**  
Claimant

**IOWA PREMIUM LLC**  
Employer

**APPEAL 16A-UI-06554-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/22/16**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 9, 2016, (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 June 29, 2016. The claimant, Florine Moore, participated and testified. The employer, Iowa Premium LLC, participated through human resource generalist, Walter Hanson.

**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 was employed full time as a bagger from August 13, 2015, until this employment ended on May 23, 2016, when she was terminated.

The employer has an attendance policy in place which outlines a points-based attendance policy. Employees are given three points for a no-call/no-show, two points for each full day missed, and one point if they arrive late or leave early. Points are accumulated for both excused and unexcused absences. After accumulating 12 points employees are terminated. Upon being hired claimant signed an acknowledgement stating she received a copy of the employee handbook, which included this policy, though she denied she was ever actually given such a document.

At the time of her termination claimant had accumulated 72 points. Claimant was given a final written warning on November 30, 2015, stating that if she accumulated an additional two points she would be discharged. Claimant accumulated 11 additional points between the time of her final written warning and her discharge. According to the employer's records claimant's final absence was on May 6, 2016. The employer noted that the absence was documented as excused, which meant she must have presented either a doctor's note or court order excusing her from work that day. Claimant denied she was absent from work that day.

## 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 § 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 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(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). 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*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

The employer testified that claimant's final absence was considered excused, though points were still assessed, indicating she must have provided a doctor's note or court order. Either type of absence would be considered excused for the purposes of unemployment insurance benefits, as neither absence is volitional. Because claimant's most recent 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 and no disqualification is imposed. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Even if claimant's most recent absence were not excused, she would still be allowed benefits. Here, the employer terminated claimant for excessive attendance issues. While an employer's absenteeism policy is not dispositive of the issue of qualification for benefits, the employer did not follow its own policy by waiting until May 23, 2016 to terminate claimant. According to the terms of the policy, claimant should have been terminated long ago. Instead, employer allowed claimant to have continued absenteeism issues with no apparent consequences. Claimant had 72 attendance points at the time of her termination, far in excess of the 12 allowable under the employer's policy. Claimant was warned in November 2015 that if she accumulated two more points she would be terminated. However, claimant was permitted to accumulate another 11 attendance points before she was finally discharged. In summary, employer acquiesced to claimant's poor conduct.

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. Here, employer gave claimant a final warning that it was going to enforce its attendance policy, but then failed to actually follow through with this. Thus, claimant did not commit willful or deliberate misconduct when she was absent on May 6, 2016. Employer failed to establish it terminated claimant for misconduct because of its own inaction toward claimant's poor conduct throughout his employment.

**DECISION:**

The June 9, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/pjs