

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TAMMY L SALMMON
Claimant

CNH AMERICA LLC
Employer

APPEAL 16A-UI-07181-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/03/16
Claimant: Appellant (1)

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 June 23, 2016, (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on July 18, 2016. The claimant, Tammy L. Salmmon, participated. The employer, CNH America, L.L.C., participated through Joyce Stimpson, HR representative. Employer's Exhibits 1 through 9 were received and admitted into the record without objection.

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 team leader in assembly from September 19, 2005, until this employment ended on June 8, 2016, when she was discharged due to absenteeism.

Claimant's final absence occurred on June 6, 2016. She called in and requested to use eight hours of personal time. The employer considers this absence unexcused, as it was not covered by any paid time off and was not for an excused reason. Claimant testified she was ill that day, due to an ovarian cyst. However, claimant did not go to the doctor that day, and she was afraid to report the absence as personal illness, as someone might see her out in the community getting medication and report that she was not actually sick. Claimant admits she did not report to the employer that she was ill that day.

Claimant had a history of absences and disciplinary actions related to those absences. Claimant was absent on April 12 and 13, due to her 12-year-old son being ill. Claimant testified that she has left him home alone in the past when he has been ill, but this illness was severe and claimant felt she needed to stay home with him. The employer issued her a five-day suspension for this two-day absence, as she had accrued seven points at that time. (Exhibits 3 and 4) Claimant was absent March 9, 10, 11, and 14, due to personal illness. Claimant

received a three-day suspension for this four-day absence, as she had accrued six points at that time. (Exhibit 5) Claimant was absent on February 8 and 9, due to personal illness. She received a written warning for this absence, as she had accrued five points at that time. (Exhibit 6) Claimant was absent on January 20 and 21, due to a personal matter. She received a verbal warning for this two-day absence, as she had accrued four attendance points at that time. (Exhibit 7) The exhibits show claimant also had two absences due to personal illness, on November 17 and 18, 2015; and two personal non-illness absences, on August 27 and October 12, 2015. On May 23, 2016, a new attendance policy went into effect. Under either attendance policy, Stimpson testified, claimant was properly discharged upon accruing eight attendance points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld.

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). 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. 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). See *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

Here, claimant's final absence was unexcused. While it may have been for personal illness, claimant did not report this to the employer. Therefore, the employer reasonably concluded this was an unexcused absence. As claimant's final absence was unexcused, the next step is to examine claimant's attendance history. Claimant was absent on 15 occasions between August 27, 2015, and June 8, 2016. Fifteen absences in less than one year is excessive. Eight of these absences were due to personal illness. Two of the absences were due to claimant's son being ill severely enough that she felt she needed to stay home with him. The remaining five absences, including claimant's final absence, were due to personal matters or were not properly reported as personal illness absences. Even eliminating claimant's excused absences from consideration, claimant was absent on five occasions in less than one year. Five personal, non-illness absences in less than one year amounts to excessive unexcused absenteeism. Benefits are withheld.

DECISION:

The June 23, 2016, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/pjs