

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TERRA L BRACY
3715 PRINCE DR SW
CEDAR RAPIDS IA 52404

CRST INC
c/o TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 05A-UI-01483-JTT
OC: 01/09/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

CRST filed a timely appeal from the February 1, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 7, 2005. Terra Bracy participated in the hearing. CRST participated through Sandy Matt, Human Resources Specialist. Exhibits One, and A through P were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Terra Bracy was employed by CRST as a full-time reference specialist supervisor from September 20, 1999 until January 7, 2005, when Scott Randall, Director of Safety, discharged her for excessive absenteeism. There was no other basis for the discharge. Ms. Bracy's scheduled hours of

employment were 7:30 a.m. to 4:30 p.m., Monday through Friday. Ms. Bracy's immediate supervisor was George Brandmayr, Safety Manager.

The absence that prompted Mr. Randall to discharge Ms. Bracy occurred during the week of January 3-7, 2005. On January 3, Ms. Bracy was absent due to strep-throat. On that morning, Ms. Bracy contacted Mr. Brandmayr at or before 7:00 a.m. and advised him that she believed she had strep-throat and would not be into work that day. Ms. Bracy did see a doctor on January 3. On January 4, Ms. Bracy left a voice message for Mr. Brandmayr at or before 7:00 a.m., in which she indicated that she needed to return to the doctor, but would try to make it into work. Ms. Bracy returned to her doctor because she was experiencing dizziness, shortness of breath and an elevated heart rate. At approximately 10:00 a.m., Ms. Bracy contacted Mr. Brandmayr's administrative assistant, inquired how things were going in her department and indicated that she would try to make it to work after lunch. Ms. Bracy then met with her doctor and the doctor referred her to the hospital for an EKG. At approximately 3:00 p.m., Ms. Bracy telephoned the employer and left a voice mail message for Mr. Brandmayr and his administrative assistant, indicating that she needed to go to the hospital for an EKG and would not be in. Ms. Bracy went to the hospital for the EKG. On January 5, Ms. Bracy contacted the employer at approximately 6:30 a.m. and left a voice mail message for Mr. Brandmayr in which she advised that she needed to return to the hospital for additional tests and would not be in. On January 6, Ms. Bracy telephoned the employer at approximately 7:00 a.m. and left a message with Mr. Brandmayr's administrative assistant in which she asked the administrative assistant to notify Mr. Brandmayr and Ms. Bracy's staff that she was ill and would not be in that day. On the evening of January 6, Ms. Bracy contacted Mr. Brandmayr to let him know that she had a follow up visit with her doctor the next day and would not be in. As part of each voice mail message Ms. Bracy left for the employer, she provided her home telephone number and her cellular telephone number in case the employer needed to contact her. On January 7, Ms. Bracy met with her doctor, who had concluded that one or more of the medications Ms. Bracy had taken for her strep throat caused her additional symptoms. The doctor then released Ms. Bracy to return to work. The doctor provided Ms. Bracy with a written excuse for the period of January 3-7.

On January 7, Scott Randall, Director of Safety, contacted Ms. Bracy and advised her that he was terminating her employment due to excessive absenteeism. Ms. Bracy asked Mr. Randall whether he had reviewed her attendance records and Mr. Randall indicated he had not. Ms. Bracy questioned Mr. Randall with regard to how he could determine her absences were excessive when he had not reviewed her attendance records, but did not receive an answer.

The employer's attendance policy is set forth in the employee handbook. Ms. Bracy signed an acknowledgement of receipt of the handbook on September 20, 1999. Under the policy, employees are required to contact their immediate supervisor during the first 15 minutes of their scheduled shift on each day they need to be absent from work. However, this written attendance policy was not enforced. Such matters were instead left to the discretion of the individual supervisors. There were effectively as many attendance policies as there were supervisors.

Ms. Bracy had most recently been absent from work on October 4-8, 2004. On October 4 and 5, Ms. Bracy had been off work to attend her grandfather's funeral. Ms. Bracy took October 6 off as a vacation day. Ms. Bracy was then absent from work due to illness on October 7-8. On October 28, 2004, Ms. Bracy received a written reprimand for excessive absences and was instructed to provide a doctor's excuse for all subsequent absences that were due to illness. Otherwise, the absence would be recorded as a vacation day. Ms. Bracy's additional attendance history is set forth in the attendance records submitted by Ms. Bracy.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Bracy was discharged for misconduct in connection with her employment based on excessive unexcused absences. It does not.

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 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.

871 IAC 24.32(7)(8) provide:

(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.

(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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Bracy's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that the absences were excessive and that the absences were unexcused. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Though the employer has a written attendance policy, it does not appear that employees were held to that policy. Instead, it appears as if the matter was left to the discretion of the individual

supervisor. The Human Resources Specialist initially testified that she was unsure whether the employer even had a written attendance policy. The Human Resources Specialist then testified that the policy required employees to call in at least 30 minutes prior to the scheduled start of a shift. Then, on rebuttal, the Human Resources Specialist testified to the written policy that obligated the employees to call in during the first 15 minutes of their shifts, and further testified that Ms. Bracy had received a copy of the policy in 1999. If the Human Resources Department is that unfamiliar with the attendance policy, the administrative law judge cannot expect the claimant to be any more familiar with the policy. For each day Ms. Bracy was absent during the period of January 3-7, she contacted the employer prior to the scheduled start of her shift. In addition, on January 7, Ms. Bracy had in her possession a doctor's excuse for the week she was absent and was prepared to provide that to the employer upon her return to work, as she has previously been directed to do.

Based on a careful review of the evidence and application of the appropriate law, the administrative law judge concludes that Ms. Bracy's absence during January 3-7 was an excused absence. Therefore, the employer has failed to prove a "current act" of misconduct that would disqualify Ms. Bracy from receiving benefits. See 871 IAC 24.32(8). Accordingly, no disqualification will enter.

DECISION:

The representative's decision dated February 1, 2005, reference 01, is affirmed. The claimant was discharged from her employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements.

jt/sc