

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KARI L RUEBER
Claimant

CONSUMER SAFETY TECHNOLOGY LLC
Employer

APPEAL 18A-UI-10447-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/23/18
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Kari Rueber, Claimant, filed an appeal from the October 15, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with Consumer Safety Technology LLC due to excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on October 31, 2018 at 3:00 p.m. Claimant participated. Employer participated through Samantha Stupka, Human Resources Business Partner, and Matthew Peterson, Sales Supervisor. Claimant's Exhibits A and B were admitted. Employer's Exhibits 1 and 3 – 6 were admitted.

ISSUE:

Whether claimant's separation was a discharge due to 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 sales associate from October 30, 2017 until her employment with Consumer Safety Technology, LLC ended on September 25, 2018. (Stupka Testimony) Claimant's direct supervisor was Matt Peterson. (Stupka Testimony) Claimant's schedule was Monday through Friday from 8:00 a.m. until 4:30 p.m. (Stupka Testimony)

Employer has a points-based attendance policy; claimant acknowledged receipt of the policy. (Stupka Testimony) The policy requires employees to notify the employer of any absences by calling an attendance line. (Stupka Testimony)

Claimant was absent from work on February 20 and 21, 2018; April 16, 2018; June 28, 2018; and July 11-13, 2018. (Stupka Testimony; Exhibit 1) Claimant's absences on these dates were all attributable to illness. (Stupka Testimony; Claimant Testimony) Claimant called the attendance line on each of these dates to inform employer of her absence or otherwise notified

employer that she would be leaving work early. (Stupka Testimony; Claimant Testimony) Claimant received a final written warning on July 16, 2018 citing these absences. (Exhibit 1)

Claimant received a written warning on August 27, 2018 citing the absences on April 16, 2018; June 28, 2018; and July 12, 2018. (Stupka Testimony) As stated above, these absences were due to illness and claimant notified employer. Both warnings stated that further infractions of the attendance policy may result additional disciplinary action up to and including termination of employment. (Stupka Testimony) Claimant received a copy of the warnings and acknowledged receipt. (Stupka Testimony)

On September 24, 2018, claimant called the attendance line at 6:24 a.m. to notify employer that she would be absent from work that day due to lack of transportation. (Stupka Testimony; Claimant Testimony) On September 25, 2018, claimant's employment was terminated due to attendance. (Stupka Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed if claimant is otherwise eligible.

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *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). An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558.

The requirements for a finding of misconduct based on absences are 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). A single unexcused absence does not constitute excessive unexcused absenteeism. See *Sallis*, 437 N.W.2d at 895.

Claimant's seven absences between February 20, 2018 and July 13, 2018 were due to illness and were properly reported to employer; therefore, those absences are excused. Claimant's absence on September 24, 2018 was due to lack of transportation – an issue of personal responsibility; therefore, the absence is unexcused. Claimant's one unexcused absence does not constitute excessive unexcused absenteeism. Employer has not met its burden of proving claimant was discharged for disqualifying job-related misconduct. Claimant was discharged for no disqualifying reason; benefits are allowed if claimant is otherwise eligible.

DECISION:

The October 15, 2018 (reference 01) unemployment insurance decision is reversed. Benefits are allowed if claimant is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs