

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

DENISE S OBRIEN

Claimant

APPEAL NO: 18A-UI-05524-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RYDER INTEGRATED LOGISTICS INC

Employer

OC: 04/15/18

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(11) – Incarceration Disqualification
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer, Ryder Integrated Logistics Inc., filed an appeal from the May 4, 2018, (reference 01) unemployment insurance decision that allowed benefits. After due notice, a telephone hearing was held on June 5, 2018. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Ted Valencia, hearing representative. Jenna Tate, human resources, testified. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant due to incarceration?

Did the claimant voluntarily quit the employment with good cause attributable to the employer?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a materials handler and was separated from employment on April 17, 2018, when she separated due to job abandonment (Employer Exhibit 1).

The claimant last performed work on April 12, 2018. Continuing work was available. The claimant did not report to work or notify the employer of her absence for three consecutive shifts

on April 13, 16 and 17, 2018. The employer's policy requires an employee to make live contact with the employer an hour in advance of a shift if they are unable to perform work. The employer policy also states an employee will be deemed to have separated from employment due to job abandonment after three no-call/no-shows. The claimant was made aware of the employer policies at hire.

The claimant did not notify the employer that she had been incarcerated or have someone notify the employer on her behalf. On April 19, 2018, the claimant contacted Ms. Tate and told her she had been absent due to incarceration after violating a no-contact order, and had been charged also with criminal mischief. At that time, she was informed that separation had ensued due to three days of no-call/no-show. The claimant did not appear at the hearing to provide any update on the disposition of charges.

The administrative record reflects that claimant has a weekly benefit amount of \$316.00 but has not received unemployment benefits since filing a claim with an effective date of April 15, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The employer's third-party vendor received the notice of fact-finding interview on behalf of the employer and provided a valid phone number to IWD for Jenna Tate to attend. However, Ms. Tate did not participate.

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 section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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:

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).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“rule [2]4.32(7)...accurately states the law”).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016) (citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)).

Iowa Code section 96.5(11) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

11. *Incarceration--disqualified.*

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection 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.

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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.” Cospers at 10. Absences due to properly reported illness are excused, 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); Cospers, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins, supra.

In this case, the claimant was made aware of the employer’s policies which require notification in advance of an absence, and that three days of no-call/no-show will lead to separation. The undisputed evidence is the claimant was a no-call/no-show for her shifts on April 13, 16 and 17, 2018, due to incarceration stemming from violating a no-contact order. The claimant did not notify the employer of her absences, or have someone notify the employer of her absence due to incarceration (as required under Iowa Code section 96.5(11)). The claimant did not attend the hearing or offer a written statement to refute the employer’s testimony. Because the claimant did not notify the employer of her final absence herself or through someone else, Iowa Code section 96.5(11) is not applicable (regardless of the disposition of charges). The administrative law judge concludes that the claimant had a minimum of three unexcused absences (due to improper notifications) on April 13, 16 and 17, 2018.

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *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); *Armstrong 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). Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. In this case, the claimant had three unexcused absences in a four month period. In this case, the claimant had three unexcused absences in a one week period. This is clearly excessive.

Based on the evidence presented, the employer has credibly established that the claimant had excessive unexcused absences by way of three no-call/no-shows on April 13, 16 and 17, 2018. The claimant knew or should have known her failure to report to work or notify the employer of absences would lead to discharge. Accordingly, the administrative law judge concludes that the employer has established the claimant was discharged for disqualifying job related misconduct and benefits are denied.

Because the claimant’s separation was disqualifying, benefits were originally allowed. However, she did not receive any benefits and therefore there is no overpayment in accordance with Iowa Code § 96.3(7). The administrative law judge further concludes the employer did not satisfactorily participate in the fact-finding interview pursuant to Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. The evidence presented supports the employer’s vendor did receive the notice of fact-finding interview but Ms. Tate failed to participate in the scheduled call.

DECISION:

The May 4, 2018, (reference 01) decision is reversed. 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. The claimant has not been overpaid benefits and therefore the issue of employer charges is moot at this time.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn