

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANGELA J GRAVES
Claimant

APPEAL 16A-UI-12172-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GILBERTVILLE – DON BOSCO
Employer

**OC: 10/16/16
Claimant: Appellant (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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 2, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant voluntarily quit by failing to report to work for three consecutive days and failing to notify her employer about her absences. The parties were properly notified of the hearing. A telephone hearing was held on November 30, 2016. The claimant, Angela J. Graves, participated. The employer, Gilbertville – Don Bosco, participated through Rick Blackwell, principal of Don Bosco Catholic High School, and was represented by Paul Jahnke. Claimant's Exhibits A, B, and C were received and admitted into the record.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a business manager, from September 4, 2015 until August 10, 2016, when she was discharged for absenteeism.

Claimant last reported to work on July 16, 2016. After that day, she went on medical leave due to anxiety. During claimant's medical leave, she learned that her husband would be having shoulder surgery, which would require her to assist him. Claimant provided telephone and text message records showing she stayed in contact with the employer during her absence in July and August. Claimant's husband had surgery on August 3, 2016. Claimant testified that after his surgery, her husband was on heavy painkillers, required his surgery dressing changed frequently, and was unable to clothe or toilet himself. On August 5, claimant contacted Blackwell and reported that her husband was not doing well and required shock therapy.

Claimant's next scheduled work day was August 8, 2016. Claimant testified that she told Blackwell when she spoke with him on August 5 that she would not be at work that day. According to claimant, she notified Blackwell that she would likely be out until the end of the week, when she would be in to complete payroll. Blackwell could not recall whether she gave him this information. Claimant's text message records show that she contacted Blackwell on August 9 and 10 to report that she would not be at work. Blackwell testified that he had difficulty contacting claimant during this period. He repeatedly attempted to call her, but his calls went straight to voicemail.

The parties gave conflicting testimony regarding the employer's attendance policy. Claimant was unaware of any attendance policy and testified that her primary form of communication with Blackwell was through text messages. Blackwell testified that the employer's attendance policy requires employees to call in and speak to him directly. Blackwell never informed claimant when she texted him to report an absence that she should be calling instead of texting. Claimant admits she and Blackwell had spoken about her attendance in the past, as recently as the spring of 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit her employment but was discharged for no disqualifying reason. Benefits are allowed.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); see also Iowa Admin. Code r. 871-24.25(35). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Here, there is ample evidence to support a conclusion that claimant did not quit her employment.

Claimant remained in contact with the employer throughout her period of absence. There is no indication that she abandoned her job or was absent for three consecutive days without contacting the employer. Therefore, this case will be analyzed as a discharge from employment and the burden of proof falls to the employer.

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.

The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. 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).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant’s final absence was due to her husband’s shoulder surgery complications, which required her to care for him. Given the short amount of time claimant was absent for this reason, the administrative law judge believes it was reasonable for claimant to miss work for this purpose. Claimant reported her absences through text messages and telephone calls with Blackwell. While Blackwell contends claimant should not have reported her absences through text messages, the evidence shows that claimant did this repeatedly and was never instructed to report the absences in another way. Because claimant’s last 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. 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.

DECISION:

The November 2, 2016, (reference 01) unemployment insurance decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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