

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**SARAH KIRKPATRICK**  
Claimant

**VON MAUR INC**  
Employer

**APPEAL 18A-UI-02860-H2**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/11/18**  
**Claimant: Appellant (2)**

---

Iowa Code §96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Absenteeism

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the February 27, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in person hearing was held on April 12, 2018 in Waterloo, Iowa. Claimant participated. Employer participated through Sarah N. Hanks, Store Manager. Employer's Exhibits 1 through 21 were admitted into the record. Claimant's Exhibit A was admitted into the record.

**ISSUE:**

Was the claimant discharged due to job connected 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 Clinique counter manager beginning on November 7, 2016 through January 11, 2018 when she was discharged. The claimant was discharged when she exhausted all of her leave and was not physically released to return to work.

In June 2017, the claimant took eight weeks off under the employer's leave of absence policy to undergo a surgery and recovery period. At the time she was not eligible for leave under the Family Medical Leave Act (FMLA) because she had not yet been employed a year.

The claimant returned to work until November 20, when her treating physician took her off work so she could recover from her anxiety and depression. The claimant qualified for FMLA leave as she had now been employed a year and had worked the requisite number of hours.

Unfortunately while the claimant was off on leave she had an accident at home and broke her ankle. Her ankle injury necessitated surgery and a stay in a skilled nursing facility. The claimant kept the employer apprised of her progress and expected return to work dates.

On January 11, Ms. Hanks and the claimant spoke about the claimant's anticipated return to work date. The employer believed that by January 11 the claimant had exhausted all of her FMLA leave as they counted her eight week absence in June 2017 as part of her leave. Additionally, the employer believed they had given the claimant an extension beyond her twelve

week entitlement. When Ms. Hanks learned that the claimant would not be able to return to work for at least one more month, she notified the claimant that she was discharged as she had exhausted her leave. The claimant was discharged solely because she had run out of leave and was still physically unable to return to work due to her non-work related ankle injury.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

The claimant's separation from work from November 20, 2017 through January 11, 2018 was a temporary absence while she was medically unable to work. However, employer initiated the end of that voluntary leave period by terminating the employment prior to her medical release to return to work based upon a calendar measurement rather than the treating physician's opinion. The employer's intention was to initiate a permanent separation rather than place claimant on an inactive employee list or indefinite unpaid medical leave. Because claimant was still on indefinite but temporary medical leave and in reasonable communication with employer about her medical status, which indicated her intention to return to the employment when medically able to do so, and employer terminated the employment relationship before her release, the separation became involuntary and permanent and is considered a discharge from employment.

The claimant's physical inability to work due to her broken ankle is not job-connected misconduct sufficient to disqualify her from receipt of unemployment insurance benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Benefits are allowed.

**DECISION:**

The February 27, 2018, (reference 01), decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

---

Teresa K. Hillary  
Administrative Law Judge

---

Decision Dated and Mailed

tkh/rvs