

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TERRY GOMEZ
Claimant

LUTHER CARE SERVICES/HOMES FOR
Employer

APPEAL 21A-UI-11451-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/21/21
Claimant: Appellant (2R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Claimant filed an appeal from the April 20, 2021, (reference 01) unemployment insurance decision that denied benefits. After proper notice, a telephone hearing was conducted on July 12, 2021. Claimant participated personally. Employer participated through Kristen Anderson, human resources generalist. Employer Exhibits A, B, and Claimant Exhibit 1 were admitted into evidence. Official notice was taken of the administrative record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was a full-time CNA beginning February 21, 2020. Claimant was trained on employer policies at the time of hire (Employer Exhibit B) including the employer's attendance policies (Employer Exhibit A). Claimant was required to notify the employer of absences two hours prior to her shift start time or find coverage for shifts, in order to avoid discipline.

Employer indicated claimant had received documented warnings on July 27, 2020, September 22, 2020, December 30, 2020 and a final warning on January 22, 2021. Claimant had requested to move her shift from five days to four days but no opening was available. Claimant had repeatedly coordinated coverage for shifts only to be told by the scheduler, Jenny/Jennifer, that the changes would not be accepted because the coverage person would move into overtime. Employer witness, Kristen Anderson, denied knowledge of shift coverage issues and the scheduler did not attend the hearing. Claimant's absences leading up to her final absence were for multiple reasons including illness, car issues, losing her keys and matters related to her children.

At the time of claimant's separation, she had three minor sons living with her. Claimant's oldest son was experiencing medical issues related to his eyes. Claimant's middle son and his girlfriend were living with claimant and their twins were born prematurely in January 2021. Claimant's youngest son and his girlfriend also lived with claimant and their child was born in

December 2020. Consequently, claimant had been off work for several occasions related to her minor's sons' children/her grandchildren's medical issues.

The final incident occurred on March 23, 2021. Claimant reported the absence after the two-hour window because she was on her way to work when her son notified her that her premature grandchild was having surgery. She notified management as soon as she could so she could be with her minor son and the grandchild at the hospital. She was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law concludes the claimant was discharged but not for disqualifying job-related misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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).

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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”).

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.” *Cosper* 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); *Cosper, supra*; *Gaborit v. Emp’t Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

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); *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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

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). Claimant’s case is unique inasmuch as claimant’s final absence on March 23, 2021 was not due to the illness of her minor child but rather her minor child’s child, who was born prematurely and needed unplanned surgery. Claimant did not properly report the absence two hours prior to shift per employer policy but did report to the employer as soon as she reasonably could under the circumstances, which was while she was headed into work. Therefore, based upon the evidence presented, the administrative law judge concludes the final absence was due to illness or other reasonable grounds and properly reported, and would be considered excused.

Iowa Admin. Code r.871-24.32(8) provides:

(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.

The administrative law judge is sympathetic to the employer, who is required by law to have certain staffing ratios in order to protect its residents. However, based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the 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, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

The issue of whether claimant was able to and available for full-time work (in light of her family obligations) effective March 26, 2021 is remanded to the Benefits Bureau for an initial investigation and decision.

DECISION:

The April 20, 2021, (reference 01) unemployment insurance decision denying benefits is REVERSED. Claimant was discharged but not for misconduct. Benefits are allowed, provided claimant is otherwise eligible.

REMAND: The issue of whether claimant was able to and available for full-time work (in light of her family obligations) effective March 26, 2021 is remanded to the Benefits Bureau for an initial investigation and decision.



Jennifer L. Beckman
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July 23, 2021
Decision Dated and Mailed

jlb/scn