

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DELMY CARDOZA

Claimant

APPEAL 17A-UI-06761-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 06/11/17

Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 29, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on July 25, 2017. The claimant, Delmy Cardoza, participated and was represented by Laura Jontz, Attorney at Law with Iowa Legal Aid. The employer, Wells Fargo Bank, N.A., participated through Wendy Saravia, Financial Crimes Supervisor; and Toni McColl of Equifax Workforce Solutions represented the employer. Employer's Exhibits 1 through 8 were received and admitted into the record without objection.

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 employed full time, most recently as a Financial Crimes Specialist, from November 30, 2015, until June 14, 2017, when she was discharged for excessive absenteeism. On June 13, 2017, claimant called into the automated attendance line and reported that she could not come to work. Claimant did not report a reason for her absence, and the employer treats all absences equally unless an absence is covered by approved FMLA leave. Claimant testified that she was absent due to a personal health issue.

Claimant had been approved for intermittent FMLA leave at some point prior to this absence. Claimant did not ask that her absence on June 13 be considered FMLA leave because she had already used her allotted one-to-two absences per month for June. Claimant did not think she was able to have the June 13 absence covered by FMLA as well. Claimant had received warnings in the past for her absenteeism. On May 8, 2017, the employer issued claimant a formal warning for what it deemed were excessive absences. (Exhibit 3) At the time claimant was discharged, she was waiting to go to the doctor and seek approval for additional

intermittent FMLA leave. Claimant knew that one or two days of protected leave each month was not sufficient, but it was “better than nothing.”

REASONING AND CONCLUSIONS OF LAW:

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

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. FMLA provisions were enacted to protect an individual’s employment, not to be used as a weapon by an employer against its employee.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant’s decision not to report this as an FMLA-covered absence was reasonable, as she believed she had used all of her FMLA leave for the month of June. Claimant called into the attendance line and properly reported that she could not come to work. The employer did not instruct her to report a reason for her absence when calling in, and it treated absences due to illness the same as absences for any other reason. In spite of the employer’s decision to treat absences for all reasons equally, claimant was absent due to personal illness and therefore it was excused. Because claimant’s final absence was both properly reported and excused, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Therefore, the history of other absences will not be examined. Benefits are allowed.

DECISION:

The June 29, 2017 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn