

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LISA KOTOUC
Claimant

COVENANT MEDICAL CENTER, INC.
Employer

**DIA APPEAL NO. 22IWDUI0072
IWD APPEAL NO. 22A-UI-00582**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/31/21
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 2, 2021 (reference 01) unemployment insurance decision that denied benefits based upon her separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on February 9, 2022. The claimant, Lisa Kotouc, participated and presented testimony. The employer, Covenant Medical Center, Inc., participated through HR Representative, Courtney DesForge, and Patient Access Manager Wendy Hintz. Official Notice was taken of the administrative file, which included the notice of telephone hearing, the transmittal form transmitting this case to DIA, the decision at issue herein, the appeal request, and Employer's written notice of potential witness testimony. Employer's Exhibits A through G were admitted as evidence without objection.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
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 began working for Covenant Medical Center, Inc. on July 6, 2021. Claimant worked as a Clinic Receptionist. Her immediate supervisor was Patient Access Manager Wendy Hintz. The attendance policy was reviewed with Claimant upon her hire and a copy of that policy was included with the employee handbook. (DesForge testimony).

The policy states excessive absenteeism includes, in part, when an individual has seven incidents or ten days of absences in a 12-month period. The policy states a colleague exhibiting excessive absenteeism may be terminated. Although corrective disciplinary action is set out in the policy, a leader is not required to follow the steps of the procedures within the employee's 90-day probationary period. Furthermore, continued excessive absenteeism after receiving a written warning will result in further disciplinary action. Claimant agreed she was aware of the

attendance policy and that absences could lead to discipline up to termination. (Ex. C; DesForge testimony; Kotouc testimony).

On September 13, 2021, Claimant received a verbal warning from her manager, Wendy Hintz, regarding excessive absenteeism. Joy Dale followed up with an email to Claimant following that conversation, warning Claimant that, per policy, when a member reaches 5 unscheduled absences, they are sent an email notifying them of this. The email informed Claimant she had 5.5 incidents as of that date. Dale reminded Claimant that at 7 incidents, disciplinary action would begin. Of the 5.5 incidents, one was assessed for September 10 and 13, 2021. (Ex. D; Hintz testimony; Ex. G).

According to her absence log, on September 21, 2021, Claimant notified the office that her daughter had been tested for Covid and Claimant was told by CHS to stay home since she had a sore throat. Two evenings later, she called in to state she had a Covid test that day and was waiting for a result and would not be in to work. These two days counted as another incident. (Ex. G). As of September 24, 2021, Claimant received an approved leave of absence due to having presumptive Covid. The Employer extended her probationary period for the same time period. She did not acquire any additional incident points between September 24, 2021 and October 1, 2021, when she returned to work. (Ex. G; DesForge testimony).

On October 22, 2021, a Friday, Claimant began working her shift with three other receptionists, including employees that were being trained. Claimant expressed to other staff that she didn't know why she was there as she was an extra person. A short time later, she went into the bathroom and when she came out, she informed coworkers that she had an emergency and needed to leave. She sent an email to Hintz, which was not received until later. Hintz stated at hearing that she and two or three other supervisors were in the back office and Claimant should have gone back and spoken directly to a supervisor and asked for permission to leave. She did not do that. Claimant received another incident point for that unexcused absence. (Ex. G; Hintz testimony; DesForge testimony; Ex. E; Ex. F).

The following Monday, October 25, 2021, Claimant called in to report she would not be coming in as she had red eye, earning another incident point. Although the undersigned counted 8.5 incident points at this time, Employer testified that Claimant had accumulated 9 incident points and 14 days of absences since her hire date. Claimant came in on Tuesday the 26th of October and worked through the remainder of the week. (Hintz testimony; DesForge testimony; Ex. G).

On Monday, November 1, 2021, Claimant was called into Hintz' office and met with Hintz and Hintz' supervisor, Suzanne Frank. Hintz told her she was being terminated due to leaving without permission on October 22, 2021, and excessive absenteeism. Hintz stated it was a violation of policy to leave work without permission from her supervisor. That action, coupled with her excessive absenteeism, led the employer to decide to terminate Claimant's employment. (Hintz testimony).

Hintz stated the employer does not have a lot of tolerance for leaving a work station unattended and not telling a supervisor. DesForge explained that leaving the work premises without permission could also be considered job abandonment which is a terminable offense. Hintz stated when she received feedback from other staff members regarding what Claimant said to them before leaving, specifically that she was not sure why she was even in the office and that she was an extra person, Hintz believed her action was intentional and that she didn't want to be there that day. Hintz acknowledged that Claimant did say in her email that her father had fallen and was disoriented. When they called Claimant into the meeting, they did not discuss her reasons for leaving and did not give her an opportunity to explain her behaviors or correct them. They had already determined they were going to terminate her employment. (Hintz testimony; DesForge testimony).

Claimant stated she assumed she would receive a verbal warning and a written warning before being fired. She stated she was told at discharge that she had too many absences and was not told her termination was due to leaving the workplace without permission. She was unaware that she was in her probationary period due to being given a leave of absence. She had no other disciplinary issues at the employer. When she left on October 22, 2021, there were four people at the desk when only two were required. Claimant was comfortable leaving when she knew they had coverage. She admitted that she did not go back and ask for permission. She stated it was an emergency situation. She was "freaking out" about her dad. They called 911 and he was hospitalized. Claimant didn't think it was necessary to go back when she sent an email. Her assumption was that they would respond to her email, saying "okay, you can go." (Kotouc testimony).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows: There is no evidence that Claimant voluntarily quit her employment. Claimant was terminated from her employment due to excessive absenteeism and leaving work without permission. The question is whether this constitutes misconduct warranting a denial of unemployment benefits.

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(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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment.” *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp’t Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” *Higgins*, 350 N.W.2d at 191 or because it was not “properly reported.” *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

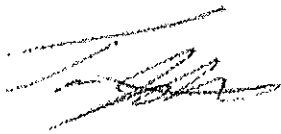
The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Id.* at 191. Excessive absenteeism has been found when there have 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. See *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. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Furthermore, in the cases of absenteeism it is the law, not the employer’s attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

Here, it is undisputed that in a four-month period, Claimant had 8-9 incidents and 14 days of unscheduled absences above what was approved by her employer. The majority of these absences were reported illnesses, and at least one of the incidents occurred in conjunction with a presumptive Covid illness. There appears to be no unreported absence listed in Employer's exhibits, and the explanations primarily referred to employer illness. It is clear Claimant did not properly seek her employer's approval before leaving the premises on October 22, 2021, due to her father's medical emergency. The undersigned administrative law judge concludes that Claimant's absences were by and large due to medical reasons and were, with that exception, reported to her employer. Therefore, they do not constitute disqualifying misconduct due to excessive absenteeism. For these reasons, the undersigned concludes that Claimant's request for benefits must be granted.

DECISION:

The December 2, 2021 (reference 01) unemployment insurance decision is REVERSED.



Tricia A. Johnston
Administrative Law Judge

February 14, 2022
Decision Dated and Mailed

TAJ/

CC: Lisa Kotouc, Claimant (by First Class Mail)
Covenant Medical Center, Inc., Employer (by First Class Mail)
Natali Atkinson, IWD (By Email)
Joni Benson, IWD (By AEDMS)

Case Title: LISA KOTOUC V. COVENANT MEDICAL CENTER INC
Case Number: 22IWDUI0072
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Tricia Johnston', is positioned above a horizontal line.

Tricia Johnston, Administrative Law Judge