

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SAMANTHA E JORGENSEN

Claimant

APPEAL 22A-UI-00293-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYERS MUTURAL CASUALTY CO

Employer

OC: 10/17/21

Claimant: Appellant (1)

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quitting
Iowa Code § 96.4(3) - Ability to and Availability for Work
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules
Iowa Admin. Code r. 871-24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Claimant/appellant, Samantha Jorgenson, filed an appeal from the November 18, 2021, (reference 01) unemployment insurance decision that denied benefits, finding the discharge from work on 10/13/21 was for excessive absenteeism. After proper notice, a telephone hearing was conducted on January 24, 2022. Claimant participated personally. Employer/Respondent, Employers Mutual Casualty Co., participated through Maggie White, associate general counsel/party representative, Tracey Baker, performance management equity consultant, and David Turner, valuation services manager and risk improvement. Judicial notice was taken of the administrative records. Employer's Exhibits 1-27 were admitted.

ISSUES:

Was the separation a layoff, discharged for misconduct or a voluntary quit without good cause?
Is the claimant able to work and available for work?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed full-time, with a set schedule, as an AutoCAD specialist. Her start date was February 24, 2020 and her last day worked was October 13, 2021. She was separated from employment on October 13, 2021. (Exhibit E-16). Claimant was aware her job was in jeopardy.

October 13, 2021, claimant was discharged for not complying with time reporting and attendance policies and failure to submit an accurate timecard. October 6, 2021, claimant was on a final written warning that she had signed acknowledged. (Exhibit E-1). The incidents that happened that resulted in termination not only violated employer's policies, but it violated the terms of the final warning.

Employer has an employee handbook which claimant received a copy, at time of employment. (Exhibit E-17). Claimant acknowledged receiving the most current handbook on June 7, 2021. (Exhibit E-18). The handbook addresses expectations of conduct (Exhibits E-19 - E-23), of which accurate timecard submissions, insubordination, excessive absenteeism/tardiness, and failing to notify the appropriate manager when unable to report to work are addressed (Exhibit E-22). Employer's attendance policy was provided in Exhibits E-24 – E-26. Employer's time reporting policy was provided in Exhibit E-27.

October 8, 2021, claimant's timecard submission was returned as is had errors. Claimant reported her 10/5/21 morning hours as 7:00AM-11:30AM but had reported in the team chat at 9:30AM she needed to be out for a bit and failed to properly record the time away from work on her timecard. Claimant reported her 10/6/21 afternoon hours as 12:30PM-4:00PM but had reported to Mr. Turner that she could not meet with him and Ms. Baker at 3:00PM as she needed to leave to pick her daughter up at school. The meeting was pushed back to 3:45PM. Claimant failed to properly record the time away from work on her timecard. Claimant reported in her 10/8/21 hours 10:00PM-11:30PM but had not requested preapproval for working that timeframe from Mr. Turner, which is the expectation. (See Exhibits E-4 – E-5 regarding October 8 timecard submission).

October 10, 2021, claimant requested the morning off from October 11, 2021, returning at 12:00PM. This was granted, but claimant was directed to let Mr. Turner know when she returned to work and her timecard was returned to be updated to reflect this leave. Mr. Turner did not hear from claimant on October 10, 2021 and reached out to her at 12:20PM and 1:15PM without a response from claimant, until 1:52PM when she reported she would not be in to work that day. The timecard issue was still unresolved. (Exhibits E-7 – E-15).

October 5, 2021, claimant left work approximately five hours early without permission. October 4, 2021, claimant no called no showed. During this timeframe, claimant failed to submit an accurate timecard (in addition to the issue closer to termination).

October 1, 2021, claimant no called no showed and did not submit her timecard. Employer reached out to claimant but heard no response.

Claimant missed her scheduled shifts on September 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 2021. Claimant's absences were due to possibly having COVID-19. Claimant failed to report her daily absences in a timely manner, with some days not reporting at all. Claimant was further directed to submit paperwork for a short-term disability leave but was insubordinate in failing to follow directions and did not submit paperwork for short term disability. Claimant advises these absences were due to her son having COVID-19 and that she tested negative on either September 15 or 16, 2021. Claimant was working from home during this time, and a mere exposure would not have prevented claimant from performing work. Employer was advised the matter was COVID related on September 17.

Claimant left work early without authorization on September 9, 2021.

During September and October 2021, claimant failed to submit three accurate payroll timecards, one of them being after the final warning. Claimant was not accurately recording her time and properly coding the time as worked, authorized PTO, etcetera. The impact of incorrectly reported timecards here would be claimant showing a higher PTO balance than if the time had been correctly reported.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct.

Iowa Code section 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.

871 IAC 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.

Iowa Admin. Code r. 871-24.1 provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

24.1(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

To the extent that the circumstances surrounding each incident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer has failed to prove they had previously warned claimant about any issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer’s interests. *Henry v. Iowa Dep’t of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp’t Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp’t Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). 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. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. See, *Gimbel v. Emp’t Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant’s late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep’t of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that claimant was warned further points could result in termination of employment and the final absence resulted in points, all of the absences were excused.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness’s appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness’s interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer’s version of events to be more credible than the claimant’s recollection of those events where there was conflict.

Employer has met their burden in proving misconduct. Claimant was warned about her absenteeism and the need to submit accurate timecards. Claimant continued to have unexcused absences, failed to submit accurate timecards and was insubordinate in failing to correct and resubmit her timecard as directed. In reviewing all of the absences at hand, all were unexcused except one due to the timeliness report issue. The excused absence became unexcused when claimant failed to report back to work when expected and provided no additional information until after the time for return to advise they were not coming in at all. It is found that the absences are excessive. Claimant further violated workplace rules on timecard reporting and was insubordinate in failing to correct her timecard.

With claimant disqualified from benefits due to misconduct, the issue of whether claimant was otherwise able to and available for work becomes moot. Claimant testified that she was, made her job searches and started new employment January 3, 2022.

DECISION:

The November 18, 2021, (reference 01) initial decision is **AFFIRMED**. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Darrin T. Hamilton
Administrative Law Judge

March 25, 2022
Decision Dated and Mailed

dh/mh