

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JASMINE N. ASHFORD
Claimant

APPEAL 23A-UI-07854-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA DERMATOLOGY CLINIC PLC
Employer

**OC: 07/09/23
Claimant: Appellant (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On August 11, 2023, the claimant/appellant filed an appeal from the August 1, 2023, (reference 01) unemployment insurance decision that denied benefits based on claimant being discharged on May 12, 2023 for excessive unexcused absenteeism and tardiness after being warned. A telephone hearing was originally scheduled for August 29, 2023. Claimant requested to reschedule due to discovery requests and trying to obtain legal counsel. The hearing was rescheduled and held on September 20, 2023. The parties were properly notified about the hearing. Claimant participated. Employer participated through attorney Kacy Flaherty-Tarpey. Regional Office Manager, Andrea Thome, and Director of Human Resources, Shelby Fries, testified on behalf of the employer. Exhibits E, 2, 3, 4, and 5 were admitted into the record. Exhibits A, B, C, D, and 1 were not admitted into the record due to relevancy and hearsay objections.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Is the claimant able to and available for work?

FINDINGS OF FACT:

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 her own common sense and experience, the administrative law judge finds the following:

Claimant began working for employer on November 10, 2022. Claimant last worked as a full-time medical assistant. Claimant was separated from employment on May 15, 2023, when she was discharged.

The employer has an attendance policy that requires employees to call in prior to their shift if they are going to be absent or tardy.

Claimant received a verbal warning regarding her attendance on March 2, 2023.

On March 30, 2023, claimant called into work prior to her shift to inform the employer she would not be at work due to needing time to travel to a funeral scheduled for March 31, 2023. Claimant was absent from work on March 31, 2023, due to attending her cousin's funeral.

Claimant received a verbal warning regarding her attendance on April 4, 2023. On April 12, 2023, claimant received a written warning for her tardiness. (Exhibit 2). Claimant was informed that any further absences may result in further disciplinary action up to and including termination. (Exhibit 2).

Claimant was absent April 13, 2023, and April 14, 2023 due to being ill. Claimant called into work prior to her scheduled shift for both of these absences. Claimant became sick with COVID and was absent from work April 17, 2023, through April 24, 2023. Claimant made the employer aware of her COVID diagnosis. The employer requires its employees to be absent from work for five days before returning to work.

Claimant left work early on April 27, 2023, due to her and her daughter having an appointment. Claimant informed her supervisor and was allowed to leave early. Claimant was absent from work on April 28, 2023, due to her daughter not having school and not having daycare. Claimant asked for the time off in advance and it was approved.

Claimant was absent May 1, 2023, and May 2, 2023, due to being ill. Claimant emailed Ms. Shelby because her supervisor, Ms. Thome, was absent.

Claimant was absent from work from May 3, 2023, through May 9, 2023. Claimant was absent due to a pipe breaking in her apartment that was related to her air conditioner. The landlord had to replace the pipes and claimant did not stay in her apartment. Claimant stayed in Iowa City and did not want to commute to work. The employer was aware of the situation and informed claimant she needed to keep them updated on her situation.

On May 10, 2023 claimant came in to work late and left early. Claimant informed the employer in advance she would be late and would need to leave early because she needed to take her daughter to school. Claimant's daughter usually rode the bus but due to bullying was no longer able to ride the bus. Claimant did not have anyone else to take her daughter to school. Claimant left early on May 10th due to needing to pick her daughter up from school and needing to attend a meeting with the school principal.

On May 11, 2023, claimant received another written warning due to her attendance. (Exhibit 4). Claimant was informed any further unexcused absences and/or tardiness would result in termination. (Exhibit 4). Claimant received a further follow up email that informed her any further unexcused absences or tardiness would be grounds for termination of employment. (Exhibit 3).

On May 15, 2023, claimant was scheduled to be at work at 9:00 a.m. Claimant was driving from Iowa City, Iowa to Des Moines, Iowa when she began experiencing car issues. Claimant's car broke down between Altoona, Iowa and Des Moines. At 8:15 a.m. claimant attempted to call her supervisor, Ms. Thome, to report her car troubles. Ms. Thome did not answer claimant's phone call.

Claimant called Ms. Thome again at approximately 9:05 a.m. During the phone call the parties discussed the employer's expectations of arriving on time and claimant's continued violation of the employer's attendance policy. Ms. Thome made the statement to claimant that "it sounds like you are quitting because you can't meet the employer's expectations." The claimant denied she was quitting her employment and told Ms. Thome to just fire her. Ms. Thome informed claimant that the expectations for her employment was to work from 8:00 a.m. until 5:00 p.m. and since claimant could not meet the expectations then they need to part ways. Claimant hung up on Ms. Thome. Claimant did not return to work.

On May 16, 2023, the employer sent claimant a letter informing her she was terminated. (Exhibit 5). Claimant was discharged due to violating the employer's attendance policy. (Exhibit 5).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a and d provide:

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.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

(9) Excessive unexcused tardiness or absenteeism.

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.

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 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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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.

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 is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer’s interest is not shown and this is essential to a finding of misconduct. *Id.*

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. 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).

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. In this case claimant was absent from work due to a pipe breaking in connection to her air conditioning unit from May 3, 2023 through May 9, 2023. Claimant did not want to stay in her apartment because they needed to fix the pipe. Claimant did not want to commute to work each day from Iowa City so she informed the employer she would not be at work. However, claimant testified that she was traveling from Iowa City the morning of May 15, 2023 when her car broke down. It appears that claimant was willing to commute from Iowa City to go to work but chose not to May 3, 2023, through May 9, 2023 even though she knew her job was in jeopardy. Additionally, claimant arrived late for work on May 10th due to taking her child to school and she left early due to needing to pick her child up from school and having a meeting with the principal. The final tardy on May 15, 2023, was due to car trouble. Although these absences, early leave, and tardiness were properly reported, they were not for reasonable grounds under Iowa law and are determined to be unexcused. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

Since claimant is not eligible for benefits the issue of whether she is able and available for benefits is moot.

DECISION:

The August 1, 2023, (reference 01) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment due to excessive, unexcused absenteeism. 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.

The issue of whether claimant is able and available for work is moot.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

September 21, 2023
Decision Dated and Mailed

CS/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.