

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NANCY B WILLIAMS

Claimant

LOVE'S TRAVEL STOPS AND COUNTRY S

Employer

APPEAL 19O-UI-08832-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/11/19

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Claimant filed an appeal from the August 30, 2019 (reference 01) unemployment insurance decision that denied benefits (Appeal 19A-UI-07216-AW-T). The parties were properly notified of the hearing. A telephone hearing was held on October 3, 2019. Both parties participated and presented evidence and testimony on both the issue of timeliness of appeal and the issue of separation from employment. On October 4, 2019, an Administrative Law Judge Decision was issued finding claimant's appeal untimely and affirming the unemployment decision denying benefits.

On October 18, 2019, claimant appealed to the Employment Appeal Board (EAB) (Appeal 19B-UI-07216). On November 7, 2019, the EAB reversed the Administrative Law Judge Decision remanded this matter to the Appeals Bureau to issue a decision on the merits of the case. Upon remand, due notice was issued in the above-captioned matter and a hearing was held on December 5, 2019 at 9:00 a.m. Claimant participated. Employer participated through Kevin Elwood, General Manager. Claimant's Exhibits A – E were admitted. Employer's Exhibits 1 and 2 were admitted.

ISSUE:

Whether claimant's separation was a discharge for disqualifying, job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record in both appeal 19A-UI-07216-AW-T and the above-captioned matter, the administrative law judge finds: Claimant was employed as a full-time cashier from August 13, 2018 until her employment with Love's Travel Stops ended on August 13, 2019. Claimant's schedule varied. Claimant's direct supervisors were the manager on duty and the general manager, Kevin Elwood.

Employer has an attendance policy which requires employees to notify the manager on duty of their absence at least three hours in advance of their scheduled shift. (Elwood Testimony; Exhibit 2) The policy further states that an employee who is absent without notice (no-call/no-show) is subject to disciplinary action up to and including termination. (Elwood Testimony;

Exhibit 2) The policy is outlined in the employee handbook. (Elwood Testimony) Claimant received a copy of the handbook. (Elwood Testimony; Exhibit 1)

On April 26, 2019 and June 23, 2019, claimant received written warnings regarding her attendance. (Elwood Testimony) The warnings stated that attendance problems will not be tolerated. (Elwood Testimony) Claimant signed and received a copy of the warning. (Elwood Testimony) During claimant's performance review on July 8, 2019, employer informed claimant that her attendance was unacceptable. (Elwood Testimony) Employer did not tell claimant that future absences may result in termination of her employment. (Elwood Testimony) Instead, employer encouraged claimant to work with human resources to arrange for a leave of absence from work if necessary. (Elwood Testimony)

On August 7, 2019, claimant was absent from work due to illness. (Elwood Testimony) Claimant notified employer via telephone two hours prior to the beginning of her shift. (Claimant Testimony) Claimant told employer that she had a note from her physician excusing claimant from work for one week until claimant saw her doctor on August 13, 2019. (Claimant Testimony) On August 7, 2019, claimant provided employer with a copy of the note. (Claimant Testimony)

Claimant was absent from work due to illness and pursuant to her physician's note on the following days: August 8, 2019; August 9, 2019; and August 12, 2019. (Claimant Testimony) Claimant believed the physician's note was sufficient notice of her absences for the week; however, claimant also erred on the side of caution and called employer three hours prior to her shifts on August 8, 2019 and August 9, 2019 to provide additional notice. (Claimant Testimony) On August 12, 2019, employer discharged claimant for job abandonment for what it considered to be a no-call/no-show by claimant on August 12, 2019. (Elwood Testimony)

REASONING AND CONCLUSIONS OF LAW:

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

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 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.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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 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. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find claimant's version of events to be more credible than employer's version of events. Claimant provided the times that she notified employer of each of her absences. Furthermore, I find claimant's testimony credible that she provided employer with a copy of her physician's note on August 7, 2019 and that she provided employer with additional notice via telephone on August 8, 2019 and August 9, 2019 out of an abundance of caution.

Claimant's absences between August 7, 2019 and August 12, 2019 were for reasonable grounds and were properly reported. Therefore, the absences were excused and do not constitute misconduct. Without a current or final act of misconduct, the history of other absences need not be examined. Claimant was discharged for no disqualifying reason. Benefits are allowed if claimant is otherwise eligible.

DECISION:

The August 30, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

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