

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**VALENTINO CLEMONS**  
Claimant

**APPEAL NO. 11A-UI-09858-VS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**XPAC**  
Employer

**OC:07/21/11  
Claimant: Appellant (2)**

Section 96.5-2-A – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a decision of a representative dated July 21, 2011, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 8, 2011, in Davenport, Iowa. Claimant participated. Employer participated by Abby Fobert, Human Resources Generalist. The record consists of the testimony of Abby Fobert; the testimony of Valentino Clemons; and Claimant's Exhibits A-H.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer does packaging and small manufacturing at its facility located in Milan, Illinois. The claimant was hired on July 26, 2010, as a full-time packer. His last day of work was June 10, 2011. He was terminated on June 10, 2011, for violation of the employer's attendance policy.

The incident that led to the claimant's termination occurred on June 9, 2011. The claimant had been off work for a back problem on June 7, 2011, and June 8, 2011. He had a physician's excuse that he received from an emergency room physician at Genesis West Hospital in Davenport, Iowa. The physician released the claimant to return to work with restrictions on June 9, 2011. The claimant went to work on June 9, 2011, and brought all of his paperwork with him.

The claimant clocked in to start his shift as scheduled at 6:00 a.m. The claimant's supervisor, George Schroeder, looked at the claimant's paperwork and noticed that the claimant had been released to return to work with restrictions. The restrictions were not specified. Mr. Schroeder asked the claimant to go back to the emergency room and get a more detailed list of his

restrictions. The claimant clocked out at 6:17 a.m. and took a bus to the hospital. He had to wait until the doctor came on duty and could not get back to work by the end of his shift. He went to work on June 10, 2011, and was terminated for having too many absences.

The employer has a progressive policy that calls for termination if there are four unexcused absences. The claimant's third unexcused absence occurred on March 18, 2011, and he was given a final written warning. The employer considered the absence on June 9, 2011, to be an unexcused absence.

### **REASONING AND CONCLUSIONS OF LAW:**

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.

871 IAC 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer.

Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984).

Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7) The employer has the burden of proof to establish misconduct.

There is insufficient evidence in this record that the claimant was terminated for a current act of misconduct. The claimant was terminated because the employer believed that his absence on June 9, 2011, was unexcused. The claimant testified that he reported to work as scheduled on June 9, 2011, with a doctor's slip that placed him on limited duty. His supervisor instructed the claimant to clock out and return to the hospital to get additional information on his restrictions. The claimant did as he was told. The physician who saw the claimant was not on duty when the claimant arrived at the hospital and the claimant had to wait for him to arrive. The claimant traveled by bus and was unable to make it back to work with the new doctor's slip by the end of his shift. He terminated the next day for having too many absences.

The final absence was due to the claimant's health condition and he simply did what his supervisor told him to do. The supervisor did not testify at the hearing to contradict the claimant's testimony. The claimant's final absence is not misconduct. In order to be disqualified from receiving unemployment insurance benefits, the employer had to show that the final absence was misconduct, even though the claimant had attendance problems prior to his final absence. Accordingly, benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated July 21, 2011, reference 02, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/css