

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ZACK R. YANCEY
Claimant

CUNNINGHAM REIS, LLC
Employer

**APPEAL 21A-UI-06975
CASE NO. 21IWDUI2060**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/22/19
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Claimant filed an appeal from the March 8, 2021, (reference 07) unemployment insurance decision that denied benefits based upon claimant's voluntarily quitting employment. The parties were properly notified of the hearing. A telephone hearing was held on April 27, 2021. The claimant, Zack Yancey, participated personally. The employer, Cunningham Reis, participated through Mary Herbert, Human Resources Director.

ISSUES:

Whether the separation was a layoff, discharge for misconduct, or voluntary quit without good cause.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a laborer. He was employed from May 2, 2019 until November 25, 2020. Claimant's job duties included building bridges. Steve Paulsen was claimant's immediate supervisor.

The employer has an attendance policy stating that if an employee cannot attend work he/she must notify the employee's supervisor or the human resources department prior to the employee's scheduled shift start time. The policy states that texting, emailing, and leaving a voicemail is not sufficient communication to report absences. The attendance policy is located in an employee manual that was provided to the claimant.

Claimant had received two warnings regarding his attendance prior to the final incidence on November 20, 2020. The first warning was a written warning and was issued on June 30, 2020 for an absence that occurred on June 29, 2020.

The second warning occurred in September 2020. During September 2020, Claimant did not show up to work and did not report any absences for approximately two weeks. The employer

considered him to have voluntarily quit. However, the employer later learned that the claimant was incarcerated during the two weeks and allowed the claimant to return to work. When the claimant returned to work, claimant's supervisor verbally discussed its absentee policy with the claimant. Claimant was warned that any further absences may result in his termination.

On November 20, 2020, claimant was scheduled to work. However, the night before, on November 19, 2020, claimant had a motor vehicle accident that left him without transportation to his job site. Prior to his scheduled shift, claimant called and left a voicemail on the employer's front office number. However, the employer did not receive the voicemail. Claimant did not hear back from the employer. Several days later, claimant contacted two fellow employees via Facebook regarding his absences from work. Neither employee was his supervisor and neither employee had any information regarding claimant's status with the employer. At some point, one of the employees informed claimant via Facebook that he believed claimant had been fired. However, no one from human resources or claimant's supervisor ever informed claimant that he had been fired. The employer believed that claimant had voluntarily quit on November 25, 2020 when claimant did not report to work and did not report any absences on November 20, 23, and 24, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

First it must be determined whether claimant quit or was discharged from employment. A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

A claimant who confronts his employer and demands that he be discharged and is subsequently discharged actually quits his employment. Job insurance benefits "are not determinable by the course of semantic gymnastics." *Frances v. IDJS*, (Unpublished Iowa App 1986). Where an individual mistakenly believes that he is discharged and discontinues coming to work (but was never told he was discharged), the separation is a voluntary quit without good cause attributable to the employer. *LaGrange v. Iowa Department of Job Service*, (Unpublished Iowa Appeals 1984).

In this case claimant did not intend to quit. Although claimant did not show up to work for several days, claimant testified that if he had transportation to the job site, he would have continued to work. However, due to the motor vehicle accident, he was unable to find transportation to the job site. In addition, claimant attempted to contact the employer and inform them of his lack of transportation. Therefore, claimant did not voluntarily quit; rather, claimant was discharged from employment for job-related misconduct.

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). 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 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).

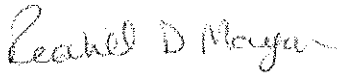
In this case, the claimant received two prior warnings about his absences and knew that he needed to properly request and report vacations and absences. However, the claimant did not properly report his absences on November 20, 23, and 24, 2020. On November 20, 2020, Claimant attempted to leave a voicemail at the "front office" which was not received by the employer. This was an improper reporting of the absence since the employer's policy states that an employee must report absences to his or her supervisor and may not leave a voicemail. In addition, claimant attempted to contact other employees to notify them of his absence. However, none of the employees were his supervisor and he failed to contact such employees until several days after he failed to report to work. Thus, claimant failed to show up to work for three days and failed to properly report such absences. In addition, claimant had prior unexcused and unreported absences in June 2020 and September 2020. Claimant's absenteeism was excessive and constitutes misconduct.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absences on November 20, 23, and 24,

2020 were not excused. The final incident, in combination with the claimant's history of unexcused absenteeism amount to job-related misconduct. Benefits are denied.

DECISION:

The March 8, 2021, (reference 07) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employee until such time as he is deemed eligible.



Rachel D Morgan
Administrative Law Judge

04/28/2021

Decision Dated and Mailed

rm/aa

CC: Zack Yancey, Claimant (by first class mail)
Cunningham Reis, LLC, Employer (by first class mail)
Nicole Merrill, IWD (email)
Joni Benson, IWD (email)

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.