

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

HAROLD B BRYANT
1316 F AVE NW
CEDAR RAPIDS IA 52405

PER MAR SECURITY & RESEARCH CORP
PER MAR SECURITY SERVICE
c/o UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-01624-B4T
OC: 01-11-04 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Harold B. Bryant appealed from an unemployment insurance decision dated February 10, 2004, reference 01, that held, in effect, the claimant was not eligible to receive unemployment insurance benefits and the employer's account would not be charged. An explanation of the decision was that the records indicated he was discharged from his employment with Per Mar Security and Research Corporation on January 7, 2004 for excessive unexcused absenteeism after being warned.

A telephone conference hearing was scheduled and held on March 4, 2004, pursuant to due notice. Harold B. Bryant participated. Bob McFall, Operations Manager, participated on behalf

of the employer. Dr. Roxanne Dunn was issued a subpoena to participate as a witness on behalf of the claimant but was unable to do so because of a prior commitment.

Subsequently an additional hearing was scheduled and held on April 21, 2004, pursuant to due notice. Harold B. Bryant participated. Dr. Roxanne Dunn participated as a witness on behalf of the claimant, pursuant to the issuance of a subpoena. Bob McFall, Operations Manager, participated on behalf of Per Mar Security and Research Corporation.

Official notice was taken of the unemployment insurance decision dated February 10, 2004, reference 01, together with the pages attached thereto (8 pages in all). Claimant's Exhibit A was admitted into evidence. Employer's Exhibits 1 and 2 were admitted into evidence. Employer's Exhibit C (marked in error) was admitted into evidence as an employer exhibit.

FINDINGS OF FACT:

Harold B. Bryant was employed with Per Mar Security and Research Corporation on July 29, 1999. The claimant was aware and received a handbook adopted by the employer relating to its disciplinary policy and absenteeism and tardiness as well as other matters.

In October 1999 the claimant contacted Dr. Roxanne Dunn and was treated thereafter because of hypertension due to high blood pressure in addition to allergies and depression. The claimant continues to be treated by Dr. Dunn following the termination of his employment with Per Mar Security and Research Corporation.

The employer has provided an employee absence report disclosing that the claimant was absent because of illness on numerous occasions from February 7, 2001 through January 5, 2004. Each incident of absenteeism was excused by the employer except for a family illness on December 12, 2003 and an unexcused instance of absenteeism on December 16, 2003.

During the tenure of the claimant's employment he was warned on numerous occasions because of absenteeism and tardiness and other incidents of alleged misconduct. Written warnings were provided to the claimant on May 21, 2001, March 12, 2002, September 30, 2002, and September 19, 2002 regarding instances of absenteeism and tardiness as well as inappropriate conduct. Dr. Dunn provided the claimant with statements which excused him from work on numerous occasions throughout the period of time that he was being treated by her. On January 6, 2004, she provided a statement to the claimant excusing him from work from January 4 through January 5, 2004. On January 7, 2004 the claimant was scheduled to report for work but contacted a coworker to notify his supervisor that he was ill with the flu. On January 7, 2004, the claimant was issued a written warning because of excessive absenteeism and officially discharged on January 9, 2004.

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, (7) 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(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.

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.

The evidence in the record is detailed and establishes that the claimant's conduct throughout his tenure of employment was not in all respects commendable. The claimant however was discharged for excessive unexcused absenteeism and tardiness on or about January 7, 2004. The claimant had been excused from work by a licensed and practicing physician from January 4, 2004 through January 6, 2004 and had called in on January 7, 2004 indicating he had the flu and was unable to report for work as scheduled. The incidents of absenteeism and tardiness for the most part were excused by the employer as shown by page 4 of Exhibit 1 admitted into evidence as well as the testimony in the record. It has been held that excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. See Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982).

While the instances of absenteeism and tardiness are extensive on the part of the claimant, the record does not establish a willful or wanton disregard of the employer's interest as would be found in a disregard of a standard of behavior which the employer had a right to expect of the claimant.

The administrative law judge concludes that Harold B. Bryant was discharged from his employment with Per Mar Security and Research Corporation on or about January 7, 2004 for no disqualifiable reason within the intent and meaning of Iowa Code Section 96.5-2-a.

DECISION:

The unemployment insurance decision dated February 10, 2004, reference 01, is reversed. Harold B. Bryant was discharged from his employment with Per Mar Security and Research Corporation on or about January 7, 2004 for no disqualifiable reason and unemployment insurance benefits are allowed, provided the claimant is otherwise eligible under the provisions of the Iowa Employment Security Law.

tjc/b