

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CODY R DILL
Claimant

BLACK HAWK ROOF COMPANY INC
Employer

APPEAL 19A-UI-00587-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/23/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 11, 2019, (reference 01) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 7 and 11, 2019. Claimant participated. Employer participated through safety director Greg Herting. Employer's Exhibit 1 was received after the Appeals Bureau did not receive any objections from claimant by the end of business on February 15, 2019.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on February 22, 2017. Claimant last worked as a full-time roofer. Claimant was separated from employment on October 30, 2018, when he was terminated.

Employer has an attendance policy that requires employees to appear for work. It warns employees could be terminated for excessive absenteeism. The policy requires employees to inform a foreman or supervisor if they are not going to appear for work. Claimant was aware of the policy.

On July 11, 2018, claimant suffered an injury at work. Claimant filed a claim for workers' compensation benefits and was taken off of work.

On September 10, 2018, claimant returned to work. His doctor restricted him to seated work with elevated legs for two hours per day. Employer accommodated the restrictions.

The workers' compensation insurance carrier assigned claimant a home health aide to assist him in getting ready for work and a transportation service. The carrier eventually terminated both services due to claimant's non-compliance with the care.

Claimant was absent from work on September 11, 12, 17, 18, 19, 21, 24, 25, 26, 27, 28, and 29, 2018. Claimant failed to notify the employer in advance of seven of those absences.

Claimant was absent from work on October 5, 9, 13, 15, 16, 17, 24, and 27, 2018. Seven of those absences were without notice.

On October 18, 2018, project planner Mike Kirker informed claimant he would be terminated if he did not effectively communicate with employer regarding his absences. Kirker required claimant to write an action plan to address the issue. Claimant wrote a plan stating he would borrow his neighbor's phone to notify employer, if necessary, and budget his money so he would have enough gas to get to work. Claimant was aware his job was in jeopardy.

On October 29, 2018, claimant appeared for work three hours late without notice. Employer sent him home.

On October 30, 2018, employer terminated claimant's employment.

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.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). 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).

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.

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive.

Employer has established claimant was terminated for job-related misconduct.

DECISION:

The January 11, 2019, (reference 01) decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Christine A. Louis
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Decision Dated and Mailed

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