

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIKE D BRISBOIS
Claimant

APPEAL NO: 17A-UI-13283-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BOBALEE INC
Employer

**OC: 11/26/17
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Mike D. Brisbois, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated December 18, 2017, reference 01 which denied unemployment insurance benefits finding that the claimant was discharged on November 28, 2017 for repeated tardiness in reporting to work after being warned. After due notice was provided, a telephone hearing was held on January 18, 2018. Claimant participated. The employer participated by Mr. Kenneth Whithim, Human Resource Manager.

ISSUE:

Whether the claimant was discharged for work connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds: Mike Brisbois was employed by Bobalee Hydraulics Inc. from October 10, 2011 until November 18, 2017 when he was discharged for being excessively tardy. Mr. Brisbois was employed as a full-time machine operator and was scheduled to work 3:30 p.m. until 1:45 a.m., five to six nights per week. Claimant was paid by the hour. His immediate supervisors were Damian Wilson and Craig Hansen.

Mr. Brisbois was discharged from employment after he continued to report to work late after the employer had repeatedly warned and then suspended the claimant on two occasions for excessive tardiness. During the final six months of his employment, the company records reflect that the claimant had reported to work late on approximately 39 occasions, he had called off work for personal reasons on four occasions, and had missed work because he was incarcerated on two days and missed work on four occasions due to transportation problems.

The claimant's tardiness was caused in part because the claimant was assisting his wife who has serious medical problems and because of ongoing transportation issues. It was the claimant's practice to notify the employer if he was going to be late for reasons associated with the medical care of his wife and the employer did not count those tardiness against the claimant

if he had properly called in to say that his tardiness was because of caring for his wife's medical needs. However, the majority of the occasions that the claimant was late in reporting to work he had not called in, but later stated that his tardiness was caused by transportation issues. The final infraction that caused the company to discharge Mr. Brisbois took place when the claimant arrived to work approximately 15 minutes late on November 27, 2017, and left work early prior to the end of the work shift. Mr. Brisbois reported to work late again the following workday, November 28, 2017, because it had taken him longer than expected to repair his car that day.

Prior to discharging the claimant, the employer attempted to keep Mr. Brisbois as an employee by repeatedly warning him. Claimant was most recently warned about his tardiness on May 30, 2017, October 31, 2017 and November 16, 2017. Claimant was suspended for tardiness on November 16, 2017 for three work days. The company had attempted to accommodate Mr. Brisbois by offering him the chance to report to work later each afternoon; however Mr. Brisbois declined the offer because it may have resulted in less income.

It is Mr. Brisbois' position that he was often late reporting to work because he was the sole caregiver to his wife, who was seriously ill and because he had ongoing issues with his vehicle. The claimant asserts that the transportation issues were in part, caused by the employer's refusal to buy back accrued vacation time from the claimant, which would have allowed him to purchase a different vehicle.

REASONING AND CONCLUSIONS OF LAW:

The claimant is not qualified to receive unemployment insurance benefits if an employer discharges the claimant for reasons constituting work connected misconduct. Iowa Code Section 96.5(2)(a). The employer has the burden of prove that the claimant was discharged for work connected misconduct as defined by the Iowa Employment Insurance Law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. For unemployment insurance purposes, misconduct amounts to a deliberate act in a material breach of the duties and obligations arising out of a workers employment. Misconduct is a deliberate violation or disregard of the standards of behavior the employer has a right to expect from employees or intentional or substantial disregard of the employer's interests or the employee's duties and obligations to the employer. 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a;

Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and constitutes misconduct except for illness or other reasonable grounds for which the employee was absent and were properly reported to the employer. Iowa Administrative Code 871-24.32(7) and *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 190 (Iowa 1984).

The requirements for a finding of misconduct based upon attendance infractions are two-fold. First, infractions must be excessive. See *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). The determination whether an unexcused absenteeism or tardiness is excessive necessarily requires consideration of past acts and warnings. Second, the absence or attendance infractions must be unexcused. The requirement of "unexcused" can be satisfied in two ways. An attendance infraction can be unexcused either because it was not for reasonable grounds or

because it was not properly reported. The term absenteeism also encompasses conduct that is more accurately referred to as "tardiness." Absences related to personal responsibilities such as transportation, lack of care for children or family members, and oversleeping are not considered excused. Absence due to illness or other reasonable grounds that is properly reported is considered excused.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employees are unable to report to work. A number of the claimant's late arrivals during the last six months of his employment were related to the general care of his spouse. When the claimant notified the employer in advance of his late arrivals and cited taking care of his wife as the reason; those infractions were not counted against the claimant by the employer. The majority of the instances of tardiness were because of transportation issues and not reported by the claimant or excused by the employer in advance of the occurrence. Employer's witness testified that in approximately 70% of the occasions of tardiness, Mr. Brisbois did not call in advance but he had later stated transportation as the reason.

The claimant had been warned on October 30, 2017, for excessive tardiness and told additional infractions would result in suspension or termination. He continued to report to work late and received a final warning and a three days suspension from work on November 17, 2017. The claimant continued to report to work late without calling in citing transportation problems on the afternoon of November 27, 2017 and on the afternoon of November 28, 2017.

Although sympathetic to the claimant's situation, the administrative law judge concludes that the preponderance of the evidence establishes the claimant was discharged for excessive unexcused tardiness after being warned. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated December 18, 2017, reference 01, is affirmed. Claimant was discharged for work connected misconduct. Unemployment insurance benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn