

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**KEITH D BLANCHARD**  
Claimant

**OKOBOJI BARZ INC**  
Employer

**APPEAL 22A-UI-02083-JC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/04/21**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The claimant/appellant, Keith D. Blanchard, filed an appeal from the December 17, 2021 (reference 02) Iowa Workforce Development (“IWD”) unemployment insurance decision that denied benefits. The parties waived proper notice of the hearing. A telephone hearing was held on February 15, 2022. The claimant participated. The employer/respondent, Okoboji Barz Inc., participated through Jordain Croker. The administrative law judge took official notice of the administrative records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

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 has worked several periods of employment for this employer. Most recently, he worked as the full-time chef from September 18, 2021 until he was discharged on November 4, 2021 for excessive absenteeism.

Employer’s attendance policy required claimant notify Ms. Croker within two hours of his shift start if he was unable to work. Employer’s attendance policy does list the number of absences or tardies an employee is allowed before discipline or discharge. Employer requires employees to furnish a doctor’s note if absent due to illness.

Employer reported claimant was absent from work due to illness on November 4, 2021. The claimant properly reported the absence. In addition, employer reported claimant was absent due to illness on September 22, 26, 29, October 1, and 18, 2021. Only the September 22<sup>nd</sup> absence was properly reported. Claimant did not present a doctor’s note for any of the absences.

Employer also reported claimant was tardy by three or more minutes on twenty occasions: September 24, 25, October 2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 21, 22, 23, 24 and 28, 2021. Employer stated the absences ranged from 3 minutes to an hour and 45 minutes due to a vet appointment. Claimant stated he drove an hour into work, would sometimes be a few minutes late, or get stopped on his way in to talk to other employees, and that would contribute to his tardiness.

Claimant had no prior written warnings for his attendance. Employer stated claimant was verbally warned on October 29, 2021 for his attendance, which claimant disputed, stating the meeting was about sushi rice. Ms. Croker stated she followed up with claimant via text message on November 3, 2021 about the meeting, and he called off due to illness on November 4, 2021. Claimant attributed his absences for illness due to new medication he was on, and stated on October 21, 2021, he requested FMLA paperwork to protect his job, at the suggestion of his doctor, but it was not provided. He was subsequently discharged.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged but not for disqualifying job-related misconduct. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

“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.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)(“rule [2]4.32(7)...accurately states the law”).

In order to show misconduct due to absenteeism, 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).

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In this case, employer issued one verbal warning after twenty reported tardies and five absences in claimant’s two months of employment. It is unclear from the evidence why employer delayed warning claimant, if his attendance did not meet its expectations. Claimant in this case took reasonable steps to properly report his final absence on November 4, 2021 due to illness. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp’t Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Therefore, the final absence was due to illness and properly reported, would be considered excused.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

**DECISION:**

The December 17, 2021 (reference 02) initial decision is REVERSED. The claimant was discharged but not for misconduct. Benefits are allowed, provided he is otherwise eligible.



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March 7, 2022  
Decision Dated and Mailed

jlb/mh