

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES G WILLIAMS
Claimant

APPEAL NO. 14A-UI-08688-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAZOOKA FARMSTAR INC
Employer

OC: 07/27/14
Claimant: Appellant (2/R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated August 15, 2014 (reference 01) which denied unemployment insurance benefits, finding that the claimant was discharged for excessed, unexcused absenteeism. After due notice was provided, a telephone hearing was held on September 10, 2014. Claimant participated. The employer participated by Ms. Amanda Russell, Human Resource Generalist, and Mr. Travis Colvin, Operations Manager.

ISSUE:

The issue is whether the claimant was discharged for intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: James Williams was employed by Bazooka Farmstar Inc. from September 20, 2013 until July 24, 2014 when he was discharged for being excessively absent. Mr. Williams was employed as a full-time welder, working 6:00 a.m. until 4:30 p.m. Monday through Friday, and was paid by the hour. His immediate supervisor was Brian Fox.

Mr. Williams was discharged from his employment with Bazooka Farmstar Inc. on July 24, 2014 after he had exceeded the permissible number of attendance infractions allowed under the company's no-fault attendance policy. Under the terms of the policy, employees are subject to discharge if they accumulate eight attendance infraction points for unexcused absences within a rolling 12-month period. Mr. Williams was aware of the policy and had been warned by the employer.

Mr. Williams final attendance infraction took place on July 23, 2014 when the claimant called in to report that he would be absent because of transportation problems. The claimant had previously called off work on June 27, 2014 due to illness. On May 13 he left early because of illness and did not report on May 14 or 15 because he was ill. On May 2 the claimant called in absent because he needed to provide emergency child care because his girlfriend was ill.

On March 27 the claimant called off work due to dental problems. On March 12 the claimant called off work because of back pain. The claimant had been ill and off work on February 25 through February 27.

Mr. Williams customarily called in to his employer to report his impending absences and in most cases supplied medical documentation that allowed multiple days of absence due to illness, to be reduced to one infraction point. In some instances, the company took in to consideration the medical documentation that the claimant had provided and did not count some absence days as unexcused absences.

Because of the repetitive nature of Mr. Williams absences during the short period that he was employed by the company, and because the claimant had exceeded the permissible number of absences allowed under the company's point policy, a management decision was made to terminate Mr. Williams from his employment, as the employer needed a more dependable worker.

REASONING AND CONCLUSIONS OF LAW:

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.

In discharge cases, the employer has the burden of proof to establish that the claimant's discharge took place with misconduct in connection with the employment. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury does not constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Absences related to lack of child care, are generally held to be unexcused. Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). However, a good faith inability to obtain child care due to illness may be excused. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991).

In order for a claimant's absences to constitute misconduct, that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.23(7). The determination of whether absenteeism is excessive requires consideration of whether the absences on the part of the claimant were excused or unexcused, for the purposes of the Unemployment Insurance Laws. Absences due to properly reported illness or injury, are considered excused. Even if the absences for those reasons are excessive, those absences do not constitute misconduct and cannot be used to disqualify the claimant from the receipt of unemployment insurance benefits. An employer's point system, or no-fault absenteeism policy, is not dispositive of the issue of qualification for benefits. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused and if excessive can constitute misconduct in connection with the work and disqualify an individual from receiving unemployment benefits.

In the case at hand, although Mr. Williams had exceeded the permissible number of attendance infraction points allowed for an entire year, within approximately seven months of employment, the vast majority of the claimant's absences were due to illness or injury and were properly reported. Under those circumstances, although the absences were clearly excessive they are considered excused and do not constitute misconduct in connection with the work. In the case at hand, the evidence establishes that Mr. Williams had been absent from work due to illness on approximately 13 occasions during the short period which he was employed. And that he was absent an approximately three occasions due to matters of personal responsibility, such as transportation issues. These absences are considered to be unexcused for the purposes of the Employment Security Law.

Although the administrative law judge is mindful that Mr. Williams was absent from work on numerous occasions during his short period of employment, the number of unexcused absences during that time, for matters of personal responsibility, only happened on three occasions. The number of unexcused absences thus was not excessive.

The question before the administrative law judge is not whether the employer has a right to discharge their employee for these reasons, but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Mr. Williams was clearly a sound decision from a management viewpoint, the evidence in the record does not establish that the claimant had been excessively absent for reasons that are considered to be unexcused by the Employment Security Law. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Because the frequency of the claimant's absences from work raises the issue of whether the claimant is able and available for full-time work, the issue of the claimant's availability and ability to work is remanded to the Claims Section for investigation and determination.

DECISION:

The representative's decision dated August 15, 2014 (reference 01) is reversed. Claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible. The issue of whether the claimant is able and available for work is remanded to the Claims Section for investigation and determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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