

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANTWAINE MACK
Claimant

CAY-CAL LOGISTICS, INC.
Employer

**DIA APPEAL NO. 22IWDUI0005
APPEAL 21A-UI-15319**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/15/20
Claimant: APPELLANT (2R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.6(2) – Timely Appeal

STATEMENT OF THE CASE:

The Claimant/Appellant, Antwaine Mack, filed an appeal from the March 8, 2021, unemployment insurance decision (reference 02) that concluded Appellant was not eligible for unemployment insurance benefits. The appeal was submitted July 8, 2021. On August 9, 2021, a Notice of Hearing was mailed to the Appellant's last known address of record for a telephone hearing scheduled for August 20, 2021. The Appellant/Claimant, Antwaine Mack, appeared personally and testified. The employer, Cay-Cal Logistics Inc. (Cay-Cal), appeared through administrator Stacy Kleppe and supervisor John Meeks, and they both testified. The administrative law judge took official notice of the Claimant's unemployment insurance records. No other exhibits were offered.

ISSUES:

Was the Claimant's appeal timely?

Was the Claimant discharged for disqualifying job-related misconduct, including excessive unexcused absenteeism after warning?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a route delivery driver by Cay-Cal. Claimant's job was to deliver and pick up packages for the Federal Express Corporation (FedEx) in urban, commercial, and residential areas. FedEx contracts its pickup and delivery services to private companies. Cay-Cal was one of several contractors that supplied drivers for FedEx in the relevant area. The Cay-Cal drivers, including Claimant, would report to the FedEx facility to start their delivery routes in company trucks, dropping off and picking up packages along the way. Claimant previously worked for one of the other contractors hired by FedEx. Later, Cay-Cal was looking to hire drivers and hired Claimant on September 8, 2020. Claimant's original job duties included working from 8:00 a.m. until his route was finished. However, Claimant had some difficulty being punctual at 8:00 a.m. Claimant's immediate supervisor at Cay-Cal was Mr. John Meeks.

Meeks and Claimant agreed to start Claimant's route at 9:00 a.m., as an accommodation, because Meeks knew Claimant could finish his route. In fact, Claimant's job performance on the route was fine. The only complaint from a customer occurred when the customer alleged Claimant broke a landscaping light while performing his duties and Cay-Cal covered the matter. Meeks described Claimant as a good worker when running his route. The only issue was tardiness in the morning until the accommodation was given. Claimant admitted Meeks spoke to him once before about the issue and he received, at most, a verbal warning.

The last day Claimant actually worked for Cay-Cal was November 15, 2020. He was scheduled to work the next day, on November 16, 2020, starting at 9:00 a.m. However, on November 16, 2020, Claimant was late. Claimant states he arrived between 9:15 and 9:30 a.m. that day. Cay-Cal disputes this. Meeks testified he was out of work that day due to illness. However, he was informed that Claimant had not appeared until approximately 10:30 a.m. Meeks called in another driver ("Ross") at approximately 9:35 a.m. even though it was the other driver's day off to run Claimant's route.

The FedEx facility was managed by someone named Kenny, and his title was the senior terminal manager. Kenny was a FedEx employee, not a Cay-Cal employee, and apparently had some authority over the delivery contractor employees. There was an altercation between Claimant and Kenny that day after Claimant arrived late. Claimant described it as more of an argument, perhaps even a discussion, and invited Kenny to leave the FedEx premises to discuss the matter. Cay-Cal described it as something different. Kenny actually called the police and Claimant left the FedEx facility before law enforcement arrived. Kenny ultimately banned Claimant from that FedEx facility, and any other FedEx facility. Kenny reported the incident as a violence in the workplace issue while Claimant denies he was aggressive. At the hearing, it was clear there was an acrimonious history between Kenny and Claimant, perhaps even predating Claimant's work with Cay-Cal, when Claimant was a driver for another contractor.

Claimant was also upset that he did not have the appropriate tools to complete his route when he arrived late. He did not have a charged scanner (presumably to track packages for pickup and delivery) in his route truck. It is unclear when, exactly, this problem was raised by Claimant.

At some point, Meeks contacted Claimant and told him to just go home, because Meeks had contacted another driver, Ross, to run Claimant's route. Meeks indicated he would speak to FedEx about the matter to try to find some resolution to the dispute. Subsequently, it was not possible to bring Claimant back as a driver for Cay-Cal because it was learned Claimant was banned or locked out of all FedEx facilities. At some point, Claimant texted Meeks to inquire if he had a schedule to work and Meeks responded "what do you mean?" There was no follow up response by Claimant. Claimant testified he believed he was discharged at that point. Meeks testified he informed Claimant that he was discharged because FedEx would no longer permit Claimant on the facility property and FedEx did not, obviously, want Claimant to come back.

On March 8, 2021, the decision by Iowa Workforce Development was to deny unemployment insurance benefits for repeated tardiness for work after being warned. The written appeal was submitted July 8, 2021. The delay was due to some confusion on the part of the parties. Claimant was working with Meeks to see if Claimant could return to work. Appellant testified he did submit an online appeal, but it was apparently lost. He subsequently submitted the paper appeal.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the appeal is timely. "Unless the claimant or other interested party, after notification or within ten calendar days after notification was issued, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision." Iowa Code § 96.6(2).

This portion of the Code section dealing with timeliness of an appeal from a representative's decision states that an appeal must be filed within ten days after notification of that decision was mailed. In addressing the issue of timeliness, the Iowa Supreme Court held that this statute prescribing the time for a notice of appeal clearly limits the time to do so, and that compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979). The Court's reasoning and holding in that decision is controlling on the statutory time limit in which to file a protest after notification has been mailed.

However, there is an exception.

The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

Iowa Admin. Code r. 871-24.35(2)(96).

Here, the delay was attributable, in part, to Claimant's confusion – he was trying to work things out to see if he could return to Cay-Cal, and there was no formal termination or discharge letter. Additionally, it is un rebutted that Claimant tried to file online and then had to file a paper copy. During the COVID-19 pandemic, claimants inundated Iowa Workforce Development with appeals. In an abundance of caution, the appeal is deemed timely.

Next, for the reasons that follow, the administrative law judge concludes the Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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.

Iowa Admin. Code r 871-24.32(7) provides:

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.

Iowa Admin. Code r.871-24.32(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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10.

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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

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. See *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); *Armell 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. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case the Claimant was tardy on November 16, 2020. He had been verbally warned or talked to one time before. The employer adjusted Claimant's work schedule and there does not seem to be other unexcused absences reflected in the record. In fact, at the hearing, the discharge was due to FedEx's action – denying Claimant to come onto its property to work as a driver for Cay-Cal.

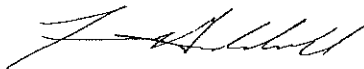
"Misconduct 'must be substantial' to justify the denial of unemployment benefits. . . . 'Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits.'" *Greenwell v. Emp. Appeal Bd.*, 879 N.W.2d 222, 227 (Iowa Ct. App. 2016) (quotation omitted). The issue is not whether the employer made a correct decision in separating employment with a 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).

Nothing in this decision should be interpreted as a condemnation of the Cay-Cal's right to terminate the Claimant for violating its policies and rule. The employer had a right to follow its rules and procedures. Claimant has no one to blame for his discharge, on this record, but himself. Mr. Meeks testified as a reasonable and credible supervisor. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that Cay-Cal's did not meet its burden of proof to establish the Claimant's conduct leading separation was "misconduct" under Iowa law. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). One verbal warning before the incident on November 16, 2020, is not substantial tardiness. Rather, it appears that the altercation with Kenny and subsequent prohibition on the FedEx property is the real issue. But, that was not the basis for the investigator's determination below. Since the employer has not met its burden of proof, benefits are allowed.

The employer has failed to establish that the Claimant was discharged for job-related "misconduct," i.e. repeated tardiness, which would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The March 8, 2021, (reference 02) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Forrest Guddall
Administrative Law Judge
Iowa Department of Inspection and Appeals
Wallace State Office Building, Third Floor
Des Moines, IA 50319

August 24, 2020

Decision Dated and Mailed

FG/aa

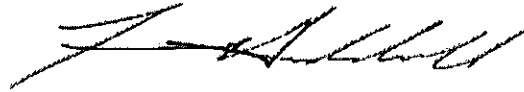
CC: Antwaine Mack, Claimant (by first class mail)
Cay-Cal Logistics Inc., Employer (by first class mail)
Nicole Merrill, IWD (email)
Joni Benson, IWD (email)

Case Title: MACK V. CAY-CAL LOGISTICS, INC.

Case Number: 22IWDUI0005

Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Forrest Guddall', written in a cursive style.

Forrest Guddall, Administrative Law Judge