

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN GERLACH

Claimant

APPEAL NO: 11A-UI-05019-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 02/20/11

Claimant: Appellant (1)

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Justin Gerlach (claimant) appealed an unemployment insurance decision dated April 1, 2011, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Wells Fargo Bank NA (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 11, 2011. The claimant participated in the hearing. The employer participated through Ryan Dehaan, Collections Supervisor and Merle Walker, Employer Representative. Employer's Exhibits One through Five were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time collection specialist from February 1, 2010 through February 2, 2011. He was discharged from employment due to excessive absenteeism with a final incident on Monday January 31, 2011 when he was a no-call/no-show. The claimant said he thought that he asked for time off that day because his birthday was on January 29, 2011 but the emails exchanged with his supervisor confirm that he took off Thursday and Friday but would return to work on Monday. He sent Supervisor Ryan DeHaan an email on Wednesday January 26, 2011 at 2:20 p.m. that stated, "Actually I was thinking the rest of this week and coming back Monday..." The claimant sent a subsequent email to Mr. DeHaan later that day at 5:58 p.m. that stated, "It's done. Thank you! I promise Monday will be a fresh start, new week/month and I'll be back to myself and perform the way I can. Thank you again!" He contends that there was more to these emails but was unable to explain how the rest of the emails would change what he had written about returning to work on Monday.

The claimant was last warned on January 24, 2011, that he faced termination from employment upon another incident of unexcused absenteeism. He also received three prior written warnings regarding excessive absenteeism. The claimant was absent from July 26, 2010 through July 28, 2010 due to a home invasion. He missed work on both Saturday December 11, 2010 and Saturday January 8, 2011 due to the flu. The claimant missed work on January 10 and 11, 2011 due to what he reported was an adverse reaction to medication. He was late for work on December 14 and 27, 2010, with one of those due to a flat tire. The claimant was over three hours late on January 14, 2011 due to oversleeping. He received a written warning for excessive attendance on January 18, 2011 and was late three times after that date, which resulted in his final warning.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

871 IAC 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.

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 Department of Job Service*, 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. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on February 2, 2011 for excessive unexcused absenteeism.

871 IAC 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

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 absenteeism, is considered excessive. Benefits are denied.

DECISION:

The unemployment insurance decision dated April 1, 2011, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs