

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ELOGE KADIMA KABONGO
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 16A-UI-08127-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/12/16
Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timeliness of Appeal
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 filed an appeal from the June 29, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination claimant was discharged from employment due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing regarding the overpayment issue was held on August 10, 2016, and a telephone hearing regarding the separation from employment was held on August 15, 2016. The claimant, Eloge Kadima Kabongo, participated. A French legal interpreter employed by CTS Language Link assisted claimant during the hearing. The employer, Tyson Fresh Meats, Inc., participated through Kristi Fox on August 10; it participated through Shannon Wehr, human resource clerk, on August 15. Employer's Exhibits 1 through 3 were received and admitted into the record without objection.

ISSUES:

Is the appeal timely?
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 was employed full time, most recently as a production worker, from October 28, 2013, until June 6, 2016, when he was discharged for attendance reasons.

Claimant was on an approved leave of absence from May 16, 2016, through May 31, 2016. Wehr did not know whether claimant was given any specific instructions regarding his return to work, but she believes he would have been told to report back for his shift on May 31. Wehr testified there was no paperwork on file indicating claimant had any contact with the employer after May 31. However, Employer's Exhibit 2 states that claimant contacted the employer and was out on an excused absence on June 6, 2016, due to personal illness.

Claimant testified that he had been on a leave of absence to return to Africa, where he has family. He fell ill while in Africa and was unable to return to Iowa as scheduled. He ultimately returned to Iowa on June 6, 2016. That day, he called in and reported that he was ill, in a state of convalescence, and unable to return to work. Claimant believed he should then go to the doctor, obtain a note excusing him from work for the duration of his illness, and return to work when he was well. Claimant had followed this procedure in the past for multi-day absences. Claimant testified he saw Dr. Rafferty and obtained a note. Claimant attempted to give the employer his doctor's note on June 13, when he returned to work. That day, the employer took his badge and told him that he was fired.

Claimant filed his claim for benefits after being discharged from employment. He participated in a fact-finding interview on approximately June 28, 2016, and he received a copy of the fact-finding decision three days later. This decision stated that he was not eligible for unemployment insurance benefits. Several days after that, claimant received a second letter informing him that he was eligible for benefits. Agency records show the agency issued a decision dated July 5, 2016 (reference 02) stating claimant was eligible to receive unemployment insurance benefits. This decision appears to stem from an incorrectly-answered question on claimant's claim form. Claimant went into his local office and was given a telephone number to call to resolve the issue. When claimant called this number, he was told to wait several days for another letter that would explain the issue. It does not appear that the agency ever issued a follow-up letter. Claimant finally filed his appeal on July 25, 2016, because he had not received another letter or any unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant timely filed his appeal and concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is. Iowa Code § 96.6(2) provides:

Initial determination. ... The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed... **Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.** If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(Emphasis added.) Here, claimant failed to timely appeal the June 29, 2016 (reference 01) fact-finding decision. However, claimant's delay was caused in significant part by relying on a statement made to him by an agency employee. Claimant expected that he would receive a third letter from the agency that would clarify whether he was eligible for benefits. It is unclear

whether the information claimant received from the agency employee was a false statement, a miscommunication, a language-barrier issue, or some combination of those factors. As the agency had some role in claimant failing to timely file his appeal, the administrative law judge will not hold claimant's delay against him. The administrative law judge finds claimant's appeal timely and will decide this case on the substantive merits.

The next issue is whether claimant's separation qualifies him for unemployment insurance benefits. 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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating 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).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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* at 192. Second, the absences must be unexcused. *Cosper* at 10. 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.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant’s final absence occurred on June 6, 2016, and was properly reported as an absence due to personal illness. While claimant may have been absent the previous week without calling in, it appears that the employer’s decision to discharge claimant occurred after his final excused absence and not after multiple days of unexcused absences. Claimant credibly testified that he returned to the employer the following week with a doctor’s note and was prepared to resume working. It was only at that point that the employer informed him that he was discharged. Because claimant’s 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, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The June 29, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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