

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ZAAKORY LOSEE
Claimant

FAMILY DOLLAR SERVICES LLC
Employer

APPEAL 21A-UI-12411-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/28/21
Claimant: Appellant (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On May 16, 2021, the claimant/appellant filed an appeal from the May 5, 2021, (reference 02) unemployment insurance decision that disallowed benefits based on claimant being discharged for excessive absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on July 23, 2021. Claimant participated at the hearing. Employer participated through Human Resource Manager, Gery Oestern. The employer called as a witness Randy Fens. Exhibits A, B, C, and 1 were admitted into the record.

ISSUE:

Was the separation a discharge for job related misconduct that disqualifies claimant from benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on August 17, 2020. Claimant last worked as a full-time Repack Manager. Claimant was separated from employment on February 22, 2021, when he was terminated by the employer.

Claimant missed a substantial amount of work with the employer. All of claimant's absences are noted in Exhibit 1, pg. 1. Claimant was scheduled to work January 25, 26, February 5, 8, 9, 10, 11, 15, 16, 17, and 18th. Claimant was absent for the following reasons:

Date	Notified Employer	Reason for absence
January 25, 2021	Notified supervisor	Out for weather
January 26, 2021	Notified supervisor	Out for weather
February 5, 2021	Notified supervisor	Had 4 feet high snow drifts. (Exhibit 1, pg. 4)
February 8, 2021	Notified supervisor	Couldn't get down his lane (Exhibit 1, pg. 5)

February 9, 2021	Notified supervisor	Out-personal business
February 10, 2021	Notified supervisor	Emergency, personal business (Exhibit 1, pg. 6)
February 11, 2021	Notified supervisor	Out-personal business
February 15, 2021	Notified supervisor	No reason given.
February 16, 2021	Notified supervisor	Text from Claimant: "I will not be in tonight. I know it's hard to understand where I'm at right now, but I will clear that up when I can return. Hopefully that's tomorrow. Thanks. (Exhibit 1, pg. 7)
February 17, 2021	Notified supervisor	Text from Claimant: "I will not be in tonight. I hope to be back tomorrow. I will let you know, thank you." The manager replied: "May I ask what is going on?" Claimant replied: "A series of events have occurred, some of which FD knows about and some they don't yet, that put my family at risk. I am forced to take care of these things before I can return to work." (Exhibit 1, pg. 12)
February 18, 2021	Notified supervisor	Unknown

The employer did not have a formal absenteeism policy. However, claimant's repeated absences were becoming an issue with the employer. On January 5, 2021, the employer had a discussion with claimant about his repeated absenteeism. Employer did not tell claimant that his continued absenteeism could lead to termination. As of January 27, 2021, claimant had missed 32 of 86 days of work. (Exhibit 1, pg. 3). Some of the absences were due to the company's mandatory quarantine policy that if an employee displayed symptoms of COVID. Some of the absences were due to the claimant living down a long lane and was not able to get out when it snowed. On January 27, 2021, Mr. Fens had a discussion with claimant about his absences. Fens did not tell claimant that if he continues missing work he would be terminated.

Claimant was awarded Personal Time Off for the days February 8, 2021 through February 12, 2021.

On February 17, 2021, employer sent a letter to the claimant asking him to notify Randy Fens by 3:30 p.m. on February 22, 2021, so they could discuss his repeated and unacceptable absences from work. (Exhibit 1, pg. 13). The letter also stated they will accept a non-response as his resignation.(Exhibit 1, pg. 13). Claimant called Mr. Fens at 3:00 p.m. on February 22, 2021, to notify him he was not resigning. Mr. Fens' asked claimant where he was at for the last two weeks and claimant did not immediately respond. Mr. Fens terminated claimant for his absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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(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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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); *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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant not to be credible. Claimant testified he was absent from work beginning February 15, 2021, due to having COVID symptoms. However, the text to his employer do not match his testimony during the hearing. (See Exhibit 1, pgs. 7 & 12). The administrative law judge finds the emails in Exhibit 1 to be more credible and reliable than the claimant's testimony. Claimant never reported any illness to the employer the week of February 15, 2021.

In this case claimant had 4 unexcused absences in a row in a one week time period. Four unexcused absences in a one week period is excessive. The claimant was aware the employer had an issue with his excessive absenteeism since he had received two separate verbal discussions about his absenteeism. The employer has established the claimant was excessively absent from his job and the excessive absences were unexcused and amount to job-related misconduct. Benefits are denied.

DECISION:

The May 6, 2021, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as he is deemed eligible.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

July 30, 2021
Decision Dated and Mailed

cs/kmj

NOTE TO CLAIMANT: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are unemployed or continue to be unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.

ATTENTION: On May 11, 2021, Governor Reynolds announced that Iowa will end its participation in federal pandemic-related unemployment benefit programs effective June 12, 2021. The last payable week for PUA in Iowa will be the week ending June 12, 2021. You may be eligible for benefits incurred prior to June 12, 2021. Additional information can be found in the press release at <https://www.iowaworkforcedevelopment.gov/iowa-end-participation-federal-unemployment-benefit-programs-citing-strong-labor-market-and>.