

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DILLON UTLEY
Claimant

APPEAL NO: 13A-UI-06302-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

PANDA EXPRESS INC
Employer

OC: 04-21-13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 20, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 3, 2013. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time cook for Panda Express from June 1, 2012 to April 17, 2013. His employment was terminated for absenteeism.

The claimant was absent due to illness April 16 and 17, 2013, and properly reported his absences to the employer. The claimant did not have a phone at the time, because he uses a prepaid phone and was out of minutes and money for the phone for the month. Consequently, he sent Facebook messages to a co-worker who was at work on those two days and he told the claimant's supervisor and the supervisor stated, "Okay." The claimant was not scheduled to work April 18, 2013, but was scheduled to return to work April 19, 2013. When the claimant reported for work he was told his employment had been terminated.

Employees commonly reported their absences through text messages. English is the supervisor's second language and he preferred that employees message him to report absences.

The claimant received a verbal warning about his attendance sometime in October 2012 for a no-call/no-show absence but never received a written warning. The employer's policy states that the first incident shall result in a verbal warning, the second shall result in a written warning, the third shall result in a suspension or termination and the fourth shall result in termination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added).

The claimant was absent due to properly reported illness April 16 and 17, 2013, and the employer terminated his employment April 19, 2013. While the claimant's method of reporting his absence to the employer was unorthodox, he did not have any more minutes on his prepaid cell phone or money to purchase more minutes. Consequently, without a phone, he did the only other thing he could think of which was to send a Facebook message to a co-worker who was at the restaurant on those two days and asked him to notify the employer he was ill and would not be at work. The employer preferred that employees communicate with him through text message and without the ability to do that the claimant made the next best choice in asking his co-worker to relay the message to his supervisor. The co-worker was successful in conveying the claimant's messages as evidenced by the employer's response of "okay."

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing and failed to provide any evidence. The evidence provided by the claimant does not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Because the final absence was related to properly reported illness and the employer has not established a final or current incident of unexcused absenteeism, the employer has not met its burden of proving disqualifying job misconduct. Therefore, benefits are allowed.

DECISION:

The May 20, 2013, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs