

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**RAYMOND E JOHNSTON**  
Claimant

**APPEAL 17A-UI-09485-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MONTEZUMA MFG DIV OF DIEOMATIC INC**  
Employer

**OC: 12/25/16  
Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Absenteeism

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 12, 2017, (reference 02) unemployment insurance decision that denied benefits based upon his discharge for repeated tardiness. The parties were properly notified of the hearing. A telephone hearing was held on October 4, 2017. The claimant participated and testified. The employer participated through Human Resource Manager Diana Duncan.

**ISSUE:**

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 as a production welder from February 1, 2015, until this employment ended on August 22, 2017, when he was discharged.

On August 15, 2017, claimant arrived to work 12 minutes late because his alarm clock had failed to go off. Claimant called the employer and reported that he was running late, but would be in within 15 minutes of his start time. Claimant testified he had been told by his supervisor that if you properly report you are running late and arrive within 15 minutes of your start time you have the option of making up your time so as to not count it against your attendance. Duncan testified she was unaware of such a policy, but that she could not say for certain what claimant's supervisor would have told him. Duncan testified that the employer's attendance policy does prohibit employees from missing more than three percent of their actual hours worked. Duncan further testified that claimant's tardy on August 15 put him over that number.

On July 12, 2017, claimant was issued a written warning and suspension for his attendance. The warning contained an advisement that further incidents may lead to termination. Claimant had received several other warnings about his attendance prior to this, the most recent one being issued on October 18, 2016. In the one year prior to August 15, 2017 claimant was

absent from work eight days and left early one day. Six of the days claimant missed, as well as the day he left early, were due to illness. Claimant could not recall for certain why he was absent the two remaining days, but testified there had been incidents where he called off work because he had to take his wife to the emergency room and that may have been the reason he was absent on those dates. All of claimant's absences were properly reported.

### **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 § 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(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.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Here, a majority of claimant's absences were due to illness and are therefore excused. If claimant's remaining two absences prior to August 15 were in fact because he was seeking emergency medical treatment for his wife, those absences would also be excused. Similarly, if claimant's testimony regarding the information given to him by his supervisor regarding his final absence is to be believed, that absence would also be excused per the policy described. In that situation benefits would be allowed, as there would be no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. However, even if we take all the disputed evidence in the light most favorable to the employer and assume claimant's final absence along with the other two were not excused, the employer still has not established disqualifying misconduct. Two absences and a 12-minute tardy do not meet the excessiveness standard. As the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility, benefits are allowed, provided claimant is otherwise eligible.

#### **DECISION:**

The September 12, 2017, (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed,

provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs