

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HAROLD ASKEW
Claimant

FAMILY DOLLAR SERVICES INC
Employer

APPEAL 19A-UI-06195-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/14/19
Claimant: Appellant (2R)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On August 6, 2019, the claimant filed an appeal from the August 2, 2019, (reference 01) unemployment insurance decision that denied benefits based on claimant's separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 13, 2019. Claimant participated personally and was represented by John Geyer. Employer did not register for the hearing and did not participate. Claimant's Exhibits A through D were received.

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 began working for employer on August 28, 2018. Claimant last worked as a full-time receiving checker. Claimant was separated from employment on July 15, 2019, when he was terminated.

On March 27, 2019, claimant injured his shoulder at work. On April 22, 2019, claimant hurt his right knee at work.

Claimant filed a claim for workers' compensation benefits. Employer gave claimant the light duty assignment of sweeping the floor for a period of time.

On May 30, 2019, the medical provider hired by the employer's workers' compensation insurance carrier released claimant to return to work without restrictions. Claimant was still experiencing pain and asked for a second opinion. Claimant was scheduled for an independent medical examination (IME) on June 24, 2019.

Due to an unfortunate series of events, claimant missed the IME on June 24, 2019. It was rescheduled for August 19, 2019. Claimant informed employer of what occurred. Employer notified claimant it expected him to return to work.

Claimant began calling in absent because he could not perform full duties with the pain he was experiencing. After four consecutive absences, employer informed claimant he was required to

apply for a medical leave of absence. Claimant did so, but his application was denied as he did not qualify for Family and Medical Leave Act (FMLA) leave.

Claimant continued to properly report his absence for every shift.

On July 15, 2019, employer terminated claimant's employment due to excessive absenteeism.

On August 13, 2019, Dr. Mann evaluated claimant and gave him restrictions of no overhead lifting and no lifting over five pounds.

On August 27, 2019, claimant began receiving temporary total disability benefits through employer's workers' compensation insurance carrier.

Iowa Workforce Development has not issued an initial decision on whether claimant is able to and available for work effective July 14, 2019.

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.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be

excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because his 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 based on claimant's separation from employment.

The issue of whether claimant is able to and available for work effective July 14, 2019, must be remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.

DECISION:

The August 2, 2019, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

REMAND:

The issue of whether claimant is able to and available for work effective July 14, 2019, is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

cal/scn