

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDRES M ESPITIA
Claimant

APPEAL NO. 10A-UI-10905-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHENKER LOGISTICS INC
Employer

OC: 06/25/10
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 26, 2010 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on October 18, 2010 in Cedar Rapids, Iowa. Claimant participated and was represented by Lois Cox, Attorney at Law, and student attorneys Carolyn Mutreux and Jeff Craig. Employer participated through Human Resources Generalist Nicki Brick. Claimant's Exhibits 1 and 2 were admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a case picker from August 11, 2008 and was separated from employment on March 24, 2010. His last day of work was March 20 and his shoulder began hurting while at work and got worse throughout the day. He went to the emergency room that night and reported his absence properly for the shift on March 21, 2010. He had been injured at work on February 19, 2009, when he tripped over a rope while moving cases of merchandise. Employer has a no-fault attendance policy and assigns points for absences related to personal illness or injury but not for a work-related illness or injury. On March 29 he called and reported he had sought treatment in the emergency room on March 21 and 22 and presented the excuse to the employer. He would have been discharged even without the medical report pursuant to the attendance policy.

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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct and absences due to properly reported illness or injury, even if excessive, cannot constitute job misconduct since they are not volitional and are excused. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Whether or not the absence was related to the workers' compensation injury, his absence was related to a properly reported illness or injury and is considered excused. Because the final absence for which he was discharged was related to properly reported illness or injury, work-related or not, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The July 26, 2010 (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw