

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JON N HAPGOOD
Claimant

YOHN CO
Employer

APPEAL 24A-UI-06767-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/07/24
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

On July 25, 2024, the claimant/appellant filed an appeal from the July 22, 2024, (reference 01) unemployment insurance decision that denied benefits based on the claimant voluntarily quitting on July 7, 2024. The Iowa Workforce Development representative determined the claimant failed to produce evidence showing that the claimant had good cause for voluntarily leaving the employer. A telephone hearing was held on August 9, 2024. The claimant participated. The employer participated through Human Resources, Stacey Skellenger. Administrative notice was taken of claimant's unemployment insurance benefits records. Employer's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9 were admitted into the record.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a concrete ready mix business that delivers concrete to customers. The claimant began working for employer on September 21, 2023. The claimant last worked as a full-time Plant Operator and Driver. The claimant was aware that the shifts end when the work is done for the day.

The employer has an attendance record policy that states:

"To maintain a safe and productive work environment Yohn Co. expects employees to be reliable and punctual in reporting for scheduled work. Absenteeism and tardiness places the burden on other employees and Yohn Co. In rare instances when employees cannot avoid being late to work or are unable to work as scheduled they should notify their supervisor as soon as possible. If the supervisor is not available please contact human resources."

The employer also requires employees request time off 30 days in advance. The claimant was aware of the policy and signed an acknowledgement of the policy on February 21, 2024.

On June 19, 2024, the claimant was scheduled to work at 8:00 a.m. The claimant was not feeling well. The claimant did not notify the employer until 8:30 a.m.

On June 24, 2024, the claimant was scheduled to work at 8:00 a.m. The claimant notified his supervisor at 8:05 a.m. that his alarm did not go off. At 8:51 a.m. the supervisor let the claimant know that he was not needed for the day.

On July 3, 2024, the claimant began his shift at 6:00 a.m. At approximately 4:00 p.m. the claimant notified the site supervisor that he could only take 1 or 2 more loads because he had a commitment at 7:00 p.m. The site supervisor told the claimant that if he did not take his last load then he would have a personnel meeting on Monday, July 8th. The claimant took another load and then took his truck back and washed it out and left at approximately 6:30 p.m. The claimant did not take his last load. Due to the claimant leaving the employer had to get other people to work later to cover for the claimant to get the job done.

Claimant was scheduled to have a meeting with the employer on Monday, July 8, 2024. The claimant was scheduled for 8:00 a.m. At 7:50 a.m. the claimant notified dispatch that he would not be at work. The claimant was suffering from anxiety and was not able to work. Later that day the employer notified the claimant that they did not have a truck available for him so he was not scheduled to work on July 9th.

On July 10, 2024, the employer had a meeting with the claimant. The claimant was issued two written warnings. The employer issued a written warning for calling into work on July 8, 2024. (Exhibit 2). The claimant was put on notice that "continued attendance issues could result in further disciplinary action." (Exhibit 2). The claimant was suspended for five days and expected to return on July 15, 2024. (Exhibit 2). The claimant was also issued another written warning for refusing to take his last assigned load to the jobsite and leaving the plant before the job was completed. (Exhibit 3). The claimant walked out of the meeting.

On July 15, 2024, the claimant and Ms. Skellenger had a meeting. During the meeting the parties discussed the claimant's return to work date. After some confusion the employer told the claimant to return on July 17, 2024. The claimant informed Ms. Skellenger that it was his birthday and he would not be working that day. The claimant did not request the day off 30 days in advance. The claimant also informed Ms. Skellenger that he would not be working more than twelve hours a day.

On July 16, 2024, the employer sent the claimant a letter informing him that he was terminated. The employer discharged the claimant due to attendance and his "lack of commitment to the company and its customers. During peak season, all employees are expected to work each day until the job is done." (Exhibit 6).

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.

Iowa Code section 96.5(2)a and d provide:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

(9) Excessive unexcused tardiness or absenteeism.

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.

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.

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.

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). The issue is not whether the employer made a correct decision in separating the 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

A claimant may be denied unemployment benefits if they have excessive unexcused absenteeism and/or tardiness. It must be noted 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. Iowa law does not treat absenteeism differently than tardiness and vice versa. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for unemployment benefits.

The requirements for a finding of misconduct that disqualifies a claimant from benefits due to absenteeism or tardiness under Iowa law is 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). 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.

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.

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." Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive requires consideration of past acts and warnings.

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

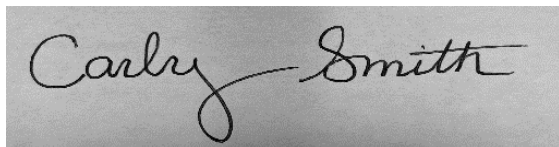
unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 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).

On June 19th the claimant called into work because he was ill. Normally this is an excused absence but the claimant called in after his shift. As a result it was not properly reported and is unexcused. On June 24th, the claimant overslept and did not notify the employer until after his shift started. This is an unexcused absence. On July 3rd the claimant left early from his shift without the employer's approval. This is an unexcused absence.

The claimant was issued a warning regarding his attendance on July 10th and was put on notice that if he continued missing work he would be subject to further disciplinary action. On July 15th the claimant notified the employer he would not be working on July 17th because it was his birthday. The claimant failed to follow the attendance policy by requesting the day off 30 days in advance. This refusal to work triggered the employer to discharge the claimant from employment. The refusal to work on July 17th was unreasonable and is unexcused. The refusal to work on July 17th and the claimant's history of unexcused absenteeism, is considered excessive. Benefits are denied.

DECISION:

The July 22, 2024 (reference 01) unemployment insurance decision is AFFIRMED. The claimant was discharged from employment due to excessive, unexcused absenteeism. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and been paid wages for insured work equal to ten times their weekly benefit amount after July 16, 2024 and provided they are otherwise eligible.

A handwritten signature in black ink that reads "Carly Smith". The signature is written in a cursive, flowing style. The "C" is large and loops around the "arly". The "Smith" is written in a more standard cursive. The signature is on a light-colored, slightly textured background.

Carly Smith
Administrative Law Judge

August 12, 2024
Decision Dated and Mailed

cs/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.