

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIKE L BRAYTON
Claimant

APPEAL NO. 14A-UI-00528-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 04/28/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the January 7, 2014, (reference 08) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 7, 2014. Claimant participated. Employer participated through on-site staffing coordinator Andrew Wood.

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 third shift (Sunday night at 10 p.m. through Friday morning at 6:30 a.m.) "temp-forever" forklift driver Control Container Management Systems from October 27, 2013, and was separated from employment on December 11, 2013. He called in sick and went to the doctor the previous Friday, December 6, when he was diagnosed with bronchitis and pneumonia. He presented an excuse to the employer covering that day. It did not contain a diagnosis or excuse for further absences although the doctor verbally told him he may need to miss further work. He did not see a medical professional again or ask for an extension of the excuse after December 6. He worked Sunday, Monday and Tuesday; December 8, 9 and 10. His last day of work was December 10, 2013. On December 11, he called his supervisor Mario to report his absence due to illness before his 10:00 p.m. shift. Wood called him at 7:00 a.m. on December 12, after claimant's shift ended at 6:30 a.m. to notify him of his discharge from employment. This ended the assignment with Control and the employment with Express Services according to Wood. Claimant had been warned verbally his job was in jeopardy due to attendance, all related to medical issues. Other warnings were for safety issues. The employer did not provide a copy of the attendance policy for the fact-finding interview or the hearing.

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. *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). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The employer has not presented credible evidence that had claimant offered a medical excuse for December 11, that he would not have been discharged because Wood changed his testimony during the hearing, did not present a copy of the policy, and referred to safety violations as a part of the reason for the separation. Although claimant had a substantial number of absences during the probationary period, because his absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed.

DECISION:

The January 7, 2014, (reference 08) decision is affirmed. 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/css