

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**RONALD H KUHL**  
Claimant

**HAGERTY EARTHWORKS LLC**  
Employer

**APPEAL 15A-UI-14339-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/29/15**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the December 22, 2015 (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for misconduct. The parties were properly notified of the hearing. A telephone hearing was held on January 22, 2016. The claimant, Ronald H. Kuhl, participated personally along with witnesses Dean Finley and Michael Ertz. The employer, Hagerty Earthworks LLC, participated through John Schafer and John Hagerty. Claimant's Exhibits A and B were received into evidence. Employer's Exhibits One and Two were received into evidence.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an Operator. He was employed from April 15, 2013 to November 30, 2015; when he was discharged. Claimant's last day worked was November 16, 2015. The employer is in the business of performing underground storm and sanitary work. Claimant's work hours were typically from 7:00 a.m. to 5:00 p.m. or 6:00 p.m. but could vary depending upon each job. His job duties included operating power equipment, managing and supervising other employees on the job site, and making sure the job was being conducted safely and correctly. Mr. Hagerty was his direct supervisor.

In July 2015, the claimant was driving the company vehicle to work and was pulled over by police. He was charged with operating while under the influence. Claimant voluntarily pled guilty to that charge and was required to complete alcohol treatment. Claimant also lost his driver's license. When this incident occurred, he called Mr. Schafer to have him retrieve the company vehicle from impound. He did not share with Mr. Schafer the reason the vehicle was impounded. Following this incident, the employer made arrangements to provide transportation

for the claimant to get back and forth to work and to his alcohol treatment meetings; which were typically immediately after work. Mr. Hagerty spoke to the claimant about these personal issues that were affecting his work and advised him that he needed to get them under control so that he could remain employed with the company. This included completing alcohol treatment, not showing up to the job site intoxicated, making sure he had regular attendance, and not operating their heavy equipment.

Another incident occurred at a job in Knoxville, Iowa a few months later. For several days, the claimant would not show up to work and Mr. Hagerty would try to contact him to find out what was going on. There was an occasion where the claimant was intoxicated on the job site and Mr. Hagerty drove the claimant back to his apartment in Knoxville. The two again had a discussion; which included the claimant showing up intoxicated to work, not showing up at all, or leaving early. During this verbal reprimand, Mr. Hagerty told the claimant he needed to think about what changes he needed to make in his life in order to be able to continue working with the company.

The final incident occurred on November 16 and 17, 2015. The claimant only worked two hours on the job site on November 16, 2015. Because storms were approaching the job site, he decided to stop working. He failed to contact Mr. Hagerty at all that day to let him know that the crew stopped working that morning (see Claimant's Exhibit A). That night, the claimant told Dean Finley (a worker that he supervised) that they were not going to work the next day because they would probably be rained out.

The following day, November 17, 2015, the claimant did not go to work and did not call Mr. Hagerty until 11:40 a.m. to let him know that he was not working that day. The claimant typically starts work around 7:00 a.m. The claimant decided to go to the hospital to try to speak to a doctor about changing his medications. This telephone call at 11:40 a.m. was the first notice that Mr. Hagerty received telling him that the claimant left early on November 16 and was not working on November 17.

#### **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. Benefits are denied.

As a preliminary matter, I find that Claimant did not quit. He was discharged from employment for job-related misconduct.

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).

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). Misconduct can include a worker's omission so long as the omission constitutes a material breach of the duties and obligations arising out of the worker's contract of employment. The claimant had several conversations and verbal warnings from Mr. Hagerty that included discussions about his attendance. The claimant knew that he needed to come to work and be able to work.

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); *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." 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.

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 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).

An employer’s absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was verbally warned that further improperly reported unexcused absences could result in termination of employment and the final absence on November 17, 2015 was not properly reported or excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

**DECISION:**

The December 22, 2015 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

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