

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIAN MYLES
Claimant

APPEAL 20A-UI-15402-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BERTCH CABINET MFG INC
Employer

**OC: 12/22/19
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 30, 2020, (reference 04) unemployment insurance decision that denied benefits based upon a finding he was discharged for willful misconduct. The parties were properly notified of the hearing. A telephone hearing was held on January 25, 2021. The claimant participated. The employer participated through Human Resources Director Mitzi Tann and Department Leader Greg Schares. The administrative law judge took official notice of the administrative records. The employer's proposed exhibits were not admitted into the record.

ISSUE:

Whether the claimant's separation was disqualifying?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full time as a hardware apprentice from June 24, 2019, until this employment ended on August 6, 2020, when he was terminated. The claimant had a set schedule from 5:30 a.m. to 3:30 p.m. Monday through Friday for his entire term of employment.

The employer has an absentee policy which is covered in its employee manual. The absentee policy states an employee will receive a verbal warning after one absence, a written warning after two absences, and discharge after three absences over a rolling six month period. In its absentee policy, a tardy is defined as an attendance occurrence which is less than two hours in duration. A tardy regardless of its duration is assessed to be a quarter of an absence. The attendance policy lists several uses of leave that if properly reported hours ahead of time would be excused. Inadequate childcare is not listed as one of these excused reasons. The claimant acknowledged receipt of the absentee policy at the time of his hire on June 24, 2019.

On Feb 13, 2020, the claimant was tardy four minutes. He clocked in at 5:34 a.m.

On May 18, 2020, the claimant was tardy one hour and 43 minutes. He clocked in at 7:18.

The claimant relies on his mother, sister, niece and oldest child to provide childcare for him. In early-June 2020, this support system fell apart because his mother, sister and niece were positive for Covid19 and his eldest was visiting his biological father.

On June 1, 2020, the claimant reported these childcare concerns to the employer and asked to be excused for shifts occurring on June 1, June 2, June 3, and June 4, 2020. The claimant was excused from working on June 1, 2020 because he had paid time off to cover that day. The employer did not excuse him from shifts on June 2, June 3, and June 4, 2020.

On June 10, 2020, the claimant received a written warning from the employer. The written warning stated the claimant was being placed on probation after accruing three and a half attendance points in three different categories of attendance incidents comprising tardy incidents, missed punches and unapproved but properly reported absences. The warning states the claimant missed punches on February 11 and March 5, 2020, (2) arrived late on February 13 and May 19, 2020, and (3) accrued unexcused absences on June 2, June 3, and June 4, 2020. The written warning stated the claimant would be terminated for any additional points prior to December 4, 2020.

The claimant carpooled with another employee, Montiece Smith, to commute to work. In July 2020, Mr. Smith's vehicle broke down several times which resulted in the following times the claimant was tardy described below.

On July 9, 2020, the claimant was tardy by one hour and 10 minutes when he clocked in at 6:10 a.m.

On July 14, 2020, the claimant was tardy by 11 minutes when he clocked in at 5:41 a.m.

On July 20, 2020, the claimant was tardy by three minutes when he clocked in at 5:33 a.m.

On July 29, 2020, the claimant was tardy by three minutes when he clocked in at 5:33 a.m.

On August 6, 2020, the Ms. Tann and Mr. Schares made the decision to terminate the claimant's employment for excessive absenteeism. The claimant was issued a termination notice which states his tardy incidents occurring on February 13, March 18, May 19, June 2, June 3, June 4, July 14, July 20, and July 29, 2020 as the reasons for his discharge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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(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 Department of Job Service*, 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). 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). 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).

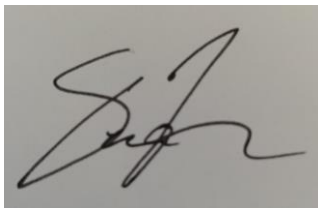
Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for 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." 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).

Here, the claimant had seven attendance issues in a two month period due to issues with his personal responsibility regarding adequate childcare and transportation. An employer’s point system or no-fault 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 warned that further unexcused absences could result in termination of employment and the final absence was not properly reported excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are granted.

DECISION:

The October 30, 2020, (reference 04) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Sean M. Nelson
Administrative Law Judge
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February 22, 2021
Decision Dated and Mailed

smn/mh