

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MACK KOLESSO
Claimant

PRINSCO INCORPORATED
Employer

APPEAL 19A-UI-08453-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/06/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

On October 28, 2019, the claimant filed an appeal from the October 22, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 20, 2019. Claimant participated personally and through a Marshallese interpreter with CTS Language Link. Employer participated through payroll and benefits generalist Mark Wellnitz.

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 began working for employer on April 23, 2018. Claimant last worked as a molder I. Claimant was separated from employment on October 2, 2019, when he was terminated.

Employer has an attendance policy stating employees will be terminated after accruing eight attendance points. It is a no fault attendance policy. Claimant was aware of the policy.

As of August 21, 2019, claimant had seven attendance points.

On September 24, 2019, claimant brought in a doctor's note excusing him from work for five days due to a non-work related medical condition, hemorrhoids. Employer gave claimant an application for Family and Medical Leave Act (FMLA) leave.

Claimant presented the application for FMLA leave to his medical provider, who stated that he would not sign it because claimant did not need ongoing leave. Instead, the provider stated he could return to work once his condition improved.

Employer did not give claimant points for his five-day absence. After the five-day absence, claimant returned to work for one day. Then his condition worsened.

Claimant was absent from work on October 2, 2019, for two hours due to his medical condition. The absence was properly reported.

Employer gave claimant one point for the October 2, 2019, absence. When claimant returned to work, employer terminated him for accruing eight attendance points.

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.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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.

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because his last

absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined.

Employer apparently makes the argument that the last absence should not be excused because claimant failed to return FMLA paperwork. First, FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee. Second, it seems plausible to the administrative law judge that a medical provider would decline to certify hemorrhoids as a serious medical condition, for which claimant needed additional leave. But that does not mean that claimant was not still experiencing extreme discomfort on October 2 and that his absence due to the medical condition could not be considered excused for purposes of unemployment insurance law.

DECISION:

The October 22, 2019, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.



Christine A. Louis
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November 26, 2019
Decision Dated and Mailed

cal/scn