

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILIP A BAUMANN
Claimant

APPEAL NO. 13A-UI-05812-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DODGE STREET ENTERTAINMENT LLC
Employer

OC: 04/27/14
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Philip Baumann (claimant) appealed a representative's May 30, 2014, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Dodge Street Entertainment (employer) for excessive unexcused absenteeism and tardiness after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 27, 2014. The claimant participated personally. The employer participated by Stacy Farrey, General Manager; Cheryl Muntz, Human Resources Assistant; and John Pizano, Chef/Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 8, 2010, as a part-time banquet cook. The claimant signed for receipt of the employer's handbook on October 8, 2010. On January 1, 2011, the employer issued the claimant a written warning for failure to follow instructions. On June 10, 2011, the employer issued the claimant a written warning for performance issues. On January 3, 2011, the employer issued the claimant a written warning for being tardy. On July 27, 2013, the employer issued the claimant a written warning for failure to notify the employer of his absence. The employer notified the claimant that further infractions could result in termination from employment. On December 14, 2013, the employer issued the claimant a written warning for poor performance. On March 3, 2014, the employer issued the claimant a written warning and four-day suspension for failure to follow instructions. The employer notified the claimant that further infractions could result in termination from employment.

The claimant was not scheduled to work on April 11, 2014. On April 12, 2014, he was scheduled to work from 12:00 a.m. to 8 p.m. He was not scheduled to work on April 13 and 14, 2014. On April 15, 2014, he was scheduled from 9:00 a.m. to 1:00 p.m. On April 16, 2014, he was scheduled from 8:00 a.m. to 3:00 p.m. On April 17, 2014, he was scheduled from 8:00 a.m.

to 2:00 p.m. On April 18, 2014, he was scheduled from 8:00 a.m. to 3:00 p.m. On April 19, 2014, he was scheduled from 8:00 a.m. to 3:00 p.m. On April 20, 2014, he was scheduled from 6:00 a.m. to 3:00 p.m.

On April 18, 2014, at approximately 9:30 a.m. the claimant called the employer and said he would be late. He arrived hours late for work. On April 19, 2014, the claimant woke up and did not feel well. He sent the employer a text saying he would be late even though he knew that texting the employer about an absence was not properly reporting an absence. The claimant started to drive to work and felt worse. He called a family member to come and get him. He did not call or text the employer. The claimant went home and slept. He was exhausted from working four days in a row. On April 20, 2014, the claimant arrived at work at 6:15 a.m. The employer terminated the claimant for excessive unexcused absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for 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(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 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).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's absence due to illness on April 19, 2014, does amount to job misconduct because it was not properly reported.

An employer is entitled to expect its employees to report to work as scheduled or to be notified 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 excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The representative's May 30, 2014, decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs