

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID RINGEN
Claimant

APPEAL NO: 09A-UI-07764-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

A-LERT
Employer

OC: 06-22-08
Claimant: Appellant (1/R)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 20, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 15 and 17, 2009. The claimant participated in the hearing. Julie Sumner, Employee Services Assistant, and Michael Latham, Supervisor, participated in the hearing on behalf of the employer. Claimant's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time millwright for A-Lert from August 11, 2008 to April 23, 2009. He was discharged from employment due to excessive absenteeism and a lack of transportation. His final incident of absenteeism occurred April 20, 2009. The employer leaves its attendance policy up to its managers. The policy does require that employees call and notify their supervisor if they will not be in that day. The claimant did not have a driver's license and told the employer that at the time of hire. He was absent due to personal issues and transportation issues September 4, 2008; October 9, 2008; December 16, 2008, December 18, 2008, January 15, January 19, March 9, April 15, and April 20, 2009. He called in sick April 9, 2009, and was tardy November 25, 2008; December 10, 2008, and was a no-call/no-show February 11, 2009. He received a written warning for missing too much work December 31, 2008; a written warning for attendance January 27; a one-day suspension for attendance February 11, 2009; a written warning April 16, 2009; a three-day suspension April 14, 15, 16, 2009; and a three-day suspension April 20, 21, 22, 2009. The employer terminated the claimant's employment April 23, 2009, for excessive unexcused absenteeism.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(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 claimant was experiencing transportation problems because he lost his driver's license. While he told the employer he did not have a license at the time he was hired, that did not relieve him of his responsibility to find a ride or make other arrangements so he could still arrive for work on time every day. 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 absenteeism, is considered excessive. Benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The May 20, 2009, reference 02, decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. 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. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css