

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEVIN ROGERS
Claimant

DOHRN TRANSFER COMPANY
Employer

APPEAL 19A-UI-05262-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/09/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On July 1, 2019, Kevin Rogers (claimant) filed an appeal from the June 27, 2019, reference 01, unemployment insurance decision that denied benefits based upon the determination Dohrn Transfer Company (employer) discharged him for excessive, unexcused absenteeism after being warned. The parties were properly notified about the hearing. A telephone hearing began on July 25, 2019 and concluded on August 12, 2019. The claimant participated personally throughout most of the hearing, but voluntarily disconnected at the end of the hearing. No further testimony was offered after he disconnected. The employer participated through Human Resource Manager Elizabeth Rodl and was represented by Director of Human Resources Sally Jackson. The Employer's Exhibits 1 through 6 were admitted without objection.

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: The claimant was employed full-time as a Dock Worker beginning on July 9, 2018, and was separated from employment on June 11, 2019, when he was discharged. The employer has an attendance policy which states after eight event points an employee may be subject to discharge. The claimant's shift started at 3:00 a.m.

The claimant notified the employer he was sick and would not be at work prior to the start of his shift on September 18, October 19, November 15, and December 21, 2018. On January 3, 2019, the employer issued an "Attendance Record of Conversation." (Exhibit 4) The claimant was reminded that he needed to attend work regularly.

On January 23, 2019, the claimant notified the employer at 2:55 a.m. that he was going to be late to work because he locked his keys in his car due to the weather. On February 16, the claimant notified the employer prior to the start of his shift that he would not be at work due to a toothache. On February 21, the claimant notified the employer at 7:00 a.m., after the start of his

shift, he would not be at work as he was going to the hospital due to chest pains. On March 1, the claimant called the employer after the start of his shift stating he would be late because he overslept; however, the claimant never reported to work and was considered a no-call/no-show. On March 12, the employer issued an "Attendance Letter of Instruction," which put the claimant on notice he had 7 event points. (Exhibit 5)

The claimant notified the employer prior to the start of his shifts on March 23 and April 9 that he would not be at work due to illness. On April 18, Human Resource Manager Elizabeth Rodl held an "Attendance Review with HR," the final step in the employer's disciplinary process. (Exhibit 2) Rodl explained to the claimant that this was his final warning and any further unplanned absences could result in termination of employment. She asked him if there was any reason he was struggling to come to work. The claimant stated he had regular dizzy spells and other medical issues. The claimant was placed on a leave of absence and directed to see his doctor to determine if he had any work restrictions. The claimant returned to work on May 3 without restrictions.

On May 16, the claimant notified the employer after the start of his shift that he would not be at work due to a migraine. On May 22, the claimant arrived at work an hour and a half late because he overslept due to a power outage. On June 6, the claimant notified the employer an hour after the start of work that he was going to be absent for personal reasons. The claimant did not report that he was sick because he did not want his co-workers to know. On June 10, at 7:00 a.m., four hours after his start time, the claimant notified the employer he was going to miss work due to personal issues. The claimant did not report that he was missing work due to poor sleep as the result of his sleep apnea. On June 11, the claimant was discharged due to attendance.

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.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 provides, in relevant part:

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.

...

(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.

This definition of misconduct 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 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 the 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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 term "absenteeism" 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. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

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 claimant's absences in 2018 and on February 16, March 23, and April 9 were all excused absences as they were properly reported and for illness or other reasonable grounds. The claimant had six other absences prior to the final absence that are considered unexcused as they were for issues of personal responsibility or were not properly reported before the start of his shift. 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 as it was not properly reported. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The June 27, 2019, reference 01, unemployment insurance 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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