

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JOHN H GARDNER III
Claimant

APPEAL NO. 19A-UI-00850-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

XPO LOGISTICS FREIGHT INC
Employer

OC: 01/06/19
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

John Gardner, III, (claimant) appealed a representative's January 22, 2019, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with XPO Logistics Freight (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 13, 2019. The claimant participated personally. The employer was represented by Susan Chmelovsky, Hearings Representative, and participated by Jeff Foster, Personnel Supervisor, and Jesse Cox, Des Moines, Iowa, Service Center Manager.

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 January 12, 2015, as a full-time dock worker. The employer had a policy manual which contains an attendance policy. The claimant did not receive a copy of it. The attendance policy stated that an employee who accumulated six attendance events in twelve months "is subject to termination".

The claimant properly reported his absences due to medical issues on January 4, 16, April 27, May 18, and June 11, 2018. He provided the employer with a doctor's excuse for most or all of the absences and accumulated five event points. He was tardy for work on May 16 and June 19, 2018, and accumulated one event point for the two occasions. The claimant signed written warnings for attendance on January 4, 16, May 17, and September 4, 2018. The employer did not give him a copy of the warnings. The documents stated that further infractions could result in termination from employment. As of September 4, 2018, the claimant had 5 event points.

On December 26, 2018, the claimant properly reported his absence due to bronchial pneumonia. He provided the employer with a note from his physician excusing him from work. The employer assessed the claimant one event point for his absence. On January 4, 2018, the

employer terminated the claimant for having accumulated six event points in a rolling twelve month period.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on December 26, 2018. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's January 22, 2019, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs