

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANTHONY J HOFFMAN
Claimant

O'REILLY AUTOMOTIVE INC
Employer

APPEAL 17A-UI-07038-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/18/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed an appeal from the July 7, 2017, (reference 02) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on July 27, 2017. Claimant participated. Employer participated through leave of absence coordinator Marissa Vaca.

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 was employed as a full-time assistant store manager from 2013, through June 2, 2017. His last day of work was January 8, 2017, when he left work early to be life-flighted for emergency medical care. Family and Medical Leave Act (FMLA) leave was granted from January 9 to April 3, 2017, and then an additional accommodation leave was approved on April 24 for leave from April 3 to May 18, 2017. On May 17, Vaca mailed a letter to claimant's sister's post office box that his leave would expire on May 18, 2017, unless he provided more information or returned to work. Claimant received the letter and consulted his physician who told him nothing had changed. On May 24 claimant showed the store manager Kyle the medical information that nothing had changed and told him his next medical appointment was not until June 8, 2017. Claimant faxed the medical documents from the store to human resources and also mailed a hard copy to human resources. There was no further request for information. Vaca sent a termination letter on June 2, which claimant did not receive. On June 8 he found out lost his job when he went to the store to purchase an item. Retail service specialist Sky could not pull up his account. He saw store manager Kyle later that day who told him he had to let him go because of direction from the corporate office.

At the appointment on June 8, 2017, his physician restricted him from work that would require standing for more than three hours without a 40-minute rest period and limited him to lifting ten pounds. At the June 18 appointment the same work limitations were affirmed. His next medical

appointment is on August 8. Claimant is seeking retail work consistent with his work-release restrictions. He has multiple sclerosis (MS) and cannot work in a factory. He has experience with mechanical work but cannot perform that work because shops are not climate controlled for MS.

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.

Iowa Code section 96.5(2)a provides:

Causes for disqualification.

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 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). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, 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. 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) (emphasis added); 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 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. 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, supra*.

A failure to report to work without notification to the employer is generally considered an unexcused absence. However, claimant credibly provided the required information to the store manager and to the human resource department. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Accordingly, benefits are allowed.

DECISION:

The July 7, 2017, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs