

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JORGE L MENDEZ
Claimant

THE HILLSHIRE BRANDS COMPANY
Employer

APPEAL 21A-UI-07220-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/03/21
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 2, 2021 (reference 01) unemployment insurance decision that found the claimant was not eligible for unemployment insurance benefits following his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on May 19, 2021. The claimant participated personally. Language Link provided language interpretation services to the claimant. The employer participated through witness Martha Vielma. Administrative Law Judges Jason Dunn, Alexis Rowe, and Carly Smith observed for training purposes. Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUE:

Was the claimant discharged for a current act of disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a general laborer. His employment began on January 25, 2016 and ended on January 4, 2021, when he was discharged.

The employer has a written attendance policy which provides that accumulation of eight points may lead to termination from employment. The claimant never received a copy of the policy but was aware that the policy existed. The employer also required employees to notify it of any absences within 30 minutes prior to the start of the employee's scheduled shift start time.

Claimant was absent from work on September 11, 2020 due to illness. He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on October 6, 2020 due to illness. He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on October 19, 2020 due to illness. He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on November 9, 2020 due to illness. He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on December 14, 2020 due to illness.

He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on December 28, 2020 due to illness. He did not properly report his absence due to illness to the employer. Claimant was absent from work on December 29, 2020 due to illness. He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on December 30, 2020 due to illness. He properly reported to the employer that he would be absent due to illness. Claimant was absent from work on December 31, 2020 due to illness. He properly reported to the employer that he would be absent due to illness.

Claimant recovered from his illness; however, he believed he was required to be tested for COVID-19 prior to returning to work. He was never informed prior to his illness what the employer required of him prior to returning to work regarding its COVID-19 mitigation practices.

Claimant telephoned human resources prior to the beginning of his shift on January 4, 2021 to determine the proper procedures to follow to be tested for COVID-19 in order to return to work. When he telephoned human resources on January 4, 2021, he was informed that he was discharged for absenteeism in violation of the employer's point attendance policy. Claimant had received no prior verbal or written warnings during the course of his employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

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(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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment.” *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984).

Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” *Higgins*, 350 N.W.2d at 191 or because it was not “properly reported.” *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer’s interest is not shown and this is essential to a finding of misconduct. *Id.*

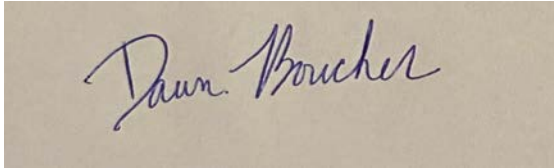
Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep’t of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer’s attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case, the final incident on January 4, 2021 that led to discharge occurred when the claimant telephoned human resources and inquired how to comply with the employer’s COVID-19 return to work policy. The claimant telephoned human resources prior to the start of his scheduled shift and therefore was not absent from work at the time of discharge. Prior to January 4, 2021, the claimant only had one instance of unexcused absenteeism on December 28, 2020. One instance of unexcused absenteeism is not considered excessive.

If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has failed to establish any current act of intentional and substantial disregard of the employer’s interest which rises to the level of willful misconduct. As such, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The March 2, 2021 (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

A rectangular area containing a handwritten signature in blue ink that reads "Dawn Boucher".

Dawn Boucher
Administrative Law Judge

May 27, 2021
Decision Dated and Mailed

db/scn