

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TONY S WOLTERMAN
Claimant

MERIDIAN MANUFACTURING INC
Employer

APPEAL 19A-UI-07833-AW-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 08/18/19
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Employer/appellant filed an appeal from the October 3, 2019 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 28, 2019, at 9:00 a.m. Claimant did not participate. Employer participated through Marla Smith, Human Resources Manager. Employer's Exhibit 1 was admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged due to its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time parts cutter from March 18, 2019 until his employment with Meridian Manufacturing, Inc. ended on August 9, 2019. Claimant worked Monday through Friday from 7:00 a.m. until 3:30 p.m. Claimant's direct supervisor was Frank Rolon, Plant Manager.

Employer has an occurrence-based attendance policy outlined in its employee handbook. The policy requires employees to notify employer of any absences at least one-half hour prior to the beginning of their shifts by leaving a voicemail message on the attendance line. Claimant received a copy of the handbook.

Claimant sustained a work-related injury to his wrist and sought medical treatment with a physician. On July 3, 2019, the physician released claimant to return to work with the restriction that he not use his left arm. Employer had work available within claimant's restrictions. Claimant returned to work on July 9, 2019 and worked for four hours. Claimant left work early due to a medical emergency with his wife. Claimant was absent from work on July 10, 2019

and July 11, 2019 due to wife's illness. From July 12, 2019 through August 9, 2019, claimant was absent from work due to wrist pain. Claimant notified employer of his absences each day by leaving a message on the attendance line. Employer attempted to contact claimant via telephone on three occasions regarding his attendance. Employer was unable to reach claimant but left voicemail messages asking claimant to contact employer regarding attendance and warning claimant that if he did not return to work that it may result in termination of employment. Claimant did not respond to employer's messages. Claimant had no prior warnings regarding attendance. On August 6, 2019, claimant's physician reduced claimant's restrictions to a two-pound weight restriction and physical therapy. On August 9, 2019, employer terminated claimant's employment for absenteeism.

The administrative record reflects that claimant has not received unemployment insurance benefits, since filing his original claim on August 18, 2019. Employer did not participate in the fact-finding interview because it did not receive a telephone call from the fact-finder.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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.

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 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. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558.

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.*, 364 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).

Claimant's absences from July 12, 2019 through August 9, 2019 were properly reported; however, the absences were not for reasonable grounds. Claimant was absent due to wrist pain but was released to return to work by a physician. Furthermore, employer had work for claimant within the restrictions. There is no evidence claimant returned to the physician to have

his restrictions modified to excuse him from work. In fact, the next release claimant received from the physician reduced claimant's restrictions instead of increasing them. Employer clearly stated its expectation to claimant that he return to work within the doctor's restrictions and that failure to do so may lead to termination of his employment. Claimant's 21 absences between July 12, 2019 and August 9, 2019 are unexcused because they were not for reasonable grounds. Twenty-one absences in less than one month are excessive. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied. Because no benefits were paid to claimant, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The October 3, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

Adrienne C. Williamson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

acw/scn