

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD A GASKEY

Claimant

APPEAL NO. 11A-UI-01904-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 01/16/11

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 8, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on April 11, 2011. Claimant participated. Employer participated through Brian Heneta, Paul Johnson, and Chris Strange and was represented by Larry Lampel of Corporate Cost Control, Inc.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked part-time as a night stock crew member and was separated from employment on January 12, 2011. Claimant had approval for vacation from January 1 through 11, 2011. On December 23 he had words with a night supervisor, so he asked Strange to be off work from December 24 through end of his vacation and planned to return to work on January 12, 2011. He heard a rumor that he was suspended, so he called Manager Jeff Foran on January 5. Foran told him he was suspended for an additional week beyond his vacation, since he had been left on the schedule for December 26, 2010 by mistake, no one notified him that was the case, and claimant did not report to work for the shift. Foran did not instruct him to report to work for a meeting about the suspension. Claimant returned from vacation and the suspension, checked his schedule, and found that he had been left on the schedule for January 12 and 13 but was not notified. Employer discharged him for not reporting to work on December 26, 2010 and January 12 and 13, 2011.

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 § 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.

871 IAC 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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A failure to report to work without notification to the employer is generally considered an unexcused absence. However, when the claimant was advised his early vacation request was approved but employer left him on the schedule without notification, the absence is excused. Likewise, the claimant's failure to report for days when he was told he was suspended but was not advised he was left on the schedule and expected to report to work, was also excused. The employer has not established misconduct and benefits are allowed.

DECISION:

The February 8, 2011 (reference 01) 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/kjw