

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CLINT M BRAUN
Claimant

BESSER COMPANY USA
Employer

APPEAL 17A-UI-06140-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/30/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 7, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on July 7, 2017. The claimant participated and testified. The employer participated through Human Resource Manager Therese Smiley, Supervisor Bryon Miller, and Operations Manager Brian Christle. Employer's Exhibits 1 through 9 were received into evidence.

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 full time as a special form fabricator from January 6, 2015, until this employment ended on April 25, 2017, when he was discharged.

The employer has a points-based attendance policy in place. (Exhibit 7). Employees accumulate points in varying amounts for different types of attendance occurrences. Employees are provided with written warnings when points are accumulated. At six points employees are given a written warning and three-day suspension. Once an employee reaches seven points, they are subject to termination. Employees have two points taken off after two consecutive months of perfect attendance. Claimant received a copy of this policy upon his hire. (Exhibit 2). The employer also has a policy regarding paid time off (PTO). (Exhibit 5). This policy grants PTO with each pay period based on years of employment and hours worked. Employees do not accumulate points for absences covered by PTO, however, may accumulate points if their PTO is insufficient to cover the absence. The policy specifically states that employees may not use any PTO over the amount that appears on their most recent paycheck. Employees are responsible for keeping track of how much PTO they have available.

On April 24, 2017, claimant requested four hours of PTO to visit a family member in the hospital. Claimant was aware his last pay check indicated he did not have a full four hours of PTO available. Because claimant took more PTO than he had available, he accumulated an attendance point. This point brought claimant's total points to seven and he was terminated in accordance with the employer's policies. The employer's records show, in the 12 months prior to April 24, 2017, claimant had eight attendance occurrences where he was either absent, tardy, or on leave without sufficient PTO. (Exhibit 9). Claimant testified he believed some of these occurrences were due to a foot injury, though he could not recall the dates of those occurrences. The employer's records show claimant was absence due to his foot injury all day on June 23 and for four and a half hours on June 30. The records also show, however, that claimant indicated he would be tardy on June 23, but never came to work or called the employer to inform them he would not be in. The employer's records also show claimant went home early due to illness on December 7, 2016. There is no indication that any of the other occurrences were due to illness or injury.

Claimant had been warned about his attendance multiple times throughout his employment, the most recent warning being issued on March 23, 2017. This warning included a three day suspension. Claimant was advised, based on his prior attendance history and disciplinary record, that he could have been terminated at this time, but was being given one final chance to improve. Claimant understood he would be subject to termination upon reaching seven points and that he was at six points as of the March 23 warning.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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(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.

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 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Claimant had nine absences in the last 12 months of his employment. At least three of

these absences were due to illness or injury and would generally be excused for the purposes of unemployment insurance benefits. However, the June 23 absence was not properly reported and therefore is not excused, meaning claimant had seven unexcused absences within a 12 month period. Claimant's final absence on April 24, 2017 was also unexcused. Claimant had been warned about his attendance as recently as March 23 and understood he would be terminated if he reached seven points. The employer has established the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The June 7, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs