

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**BRANDON A DENAVICH**

Claimant

**APPEAL NO: 19A-UI-03939-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SHEARERS FOODS BURLINGTON LLC**

Employer

**OC: 04/14/19**

**Claimant: Appellant (2)**

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 claimant, Brandon A. Denavich, filed an appeal from the May 2, 2019, (reference 01) unemployment insurance decision that denied benefits based upon the claimant's separation from this employer. The parties were properly notified about the hearing. A telephone hearing was held on June 7, 2019. The claimant participated personally and was represented by Richard A. Bartolmei, attorney at law. The employer participated through Jill Nieto, human resources generalist. Trisha Darrah also testified.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-7 and Claimant Exhibit A-D were admitted over objection. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**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: The claimant was employed full-time as a machine technician and was separated from employment on April 12, 2019, when he was discharged for excessive absences.

The employer has a no-fault attendance policy, which designates point values to attendance infractions. An employee is subject to discharge if they incur more than eight points within a rolling eight month period. Employees are also expected to notify the employer by telephone at least one hour prior to a shift if they are unable to work. The claimant received a copy of the employer policy at hire (Employer Exhibit 6). He was also issued written warnings for his attendance on August 15, 2018 and August 23, 2018 (Employer Exhibits 4-5).

The claimant had absences on August 13, 19, 20 2018 due to family reasons, January 16, and February 4, 2019 for unknown reasons. He received five points for those absences and a ½ point when he left early due to illness on March 13, 2019.

On March 29, 2019, the claimant was approved for FMLA (Claimant Exhibit A). As part of FMLA, he was entitled to “up to 1-2x per month for up to 1-7 days per episode (Claimant Exhibit A). On April 1, 2019, the claimant properly reported his absence and requested FMLA. On April 2, 2019, the claimant left early and was given ½ point. On April 3, 2019, the claimant was absent due to childcare and received one point. On April 4, 2019, the claimant properly reported his absence due to asthma and requested to use FMLA. On April 5, 2019, the claimant went to work but left early. The employer documented it was for “personal reasons”. The claimant stated it was due to his asthma and he informed the onsite leader. He received ½ point.

The claimant was absent both April 8 and 9, 2019 due to his asthma. He properly reported his absences to the employer’s hotline. He requested to use FMLA to cover the absences. The employer considered the claimant’s FMLA covered absences to be exhausted by way of his call offs on April 1 and 4, 2019. They did not consider the April 8 and 9 absences to be part of the second permissible episode allowed each month as referenced on the claimant’s FMLA paperwork. Therefore, he received two additional points for the absences which caused him to point out and be discharged on April 12, 2019.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for disqualifying job-related misconduct. Benefits are allowed.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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(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.

In the specific context of absenteeism the administrative code provides:

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. 871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. The claimant’s absences on August 13, 19, 20 2018, January 16, and February 4, 2019 would be considered unexcused based upon the reasons for the absences.

An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Absences due to properly reported illness are excused, 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). In this case, the claimant was absent March 13, April 1, 4, 5, 8 and 9, 2019 due to illness. The absences were properly reported to the employer. They would be considered excused absences.

The crux of this case is the claimant’s final absences on April 8 and 9, 2019 were due to properly reported illness. If the employer had considered the April 8 and 9 absences to be a part of the April 4 FMLA episode, he would not have incurred the points to point out or be discharged. However, even if the employer did not accept the claimant’s position on the absences being counted for FMLA, it would be moot for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, (regardless of whether the employer’s policy considered it excused or unexcused) no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading to separation was misconduct under Iowa law.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

**DECISION:**

The May 2, 2019, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs