

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

KYLE J BENTLEY
Claimant

APPEAL 23A-UI-02750-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASHLEY INDUSTRIAL MOLDING INC
Employer

**OC: 02/19/23
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Ashley Industrial Molding Inc., filed an appeal from the March 6, 2023, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion the claimant was discharged due to absences caused by his own illness. The parties were properly notified of the hearing. A telephone hearing was held on March 31, 2023. The claimant did not participate. The employer participated through Human Resources Manager Bre Hartsock. Official notice was taken of the agency records and Iowa Courts Online entries regarding the claimant's arrest. Exhibits 1, 2, 3, 4, 5, 6, and 7 were received into the record.

ISSUES:

Whether the claimant's separation from work was disqualifying?

Whether the claimant has been overpaid unemployment insurance benefits? Whether he is excused from repaying those benefits due to the employer's non-participation at factfinding?

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 handler / unloader from January 31, 2023, until this employment ended on February 18, 2023, when he was terminated. The claimant's regular schedule was Monday through Thursday from 6:00 a.m. to 4:00 p.m. Occasionally the claimant would work Friday or Saturday shifts of the same duration. Occasionally, the claimant would be scheduled to open at 4:00 a.m. on any day.

The employer has an attendance policy in its employee handbook. The attendance policy directs employees to call in to a designated line if they will be absent for a scheduled shift. The attendance policy assesses one point for approved absences of half the scheduled shift in length or more and two points for unapproved absences. Absences due to illness are not considered if a note is provided by the employee. The policy states termination results after an

employee accrues nine points. The employer provided a copy of the policy, as well as the claimant's signed receipt on January 27, 2022. (Exhibit 1)

On March 27, 2022, the claimant was scheduled to work. The claimant said he was too sick to work for that day.

On May 5, 2022, the claimant called in prior to the start of his scheduled shift and informed management that he had court that day. The claimant did not arrive at work until 9:45 a.m.

On May 6, 2022, the claimant was scheduled to work. The claimant said he was too sick to work for that day.

On June 17, 2022, the claimant asked his supervisor if he could leave early at 2:02 p.m. The supervisor approved this absence.

On July 14, 2022, the claimant was scheduled to work at 6:00 a.m. The claimant did not arrive at work until 9:20 a.m.

On July 22, 2022, the claimant asked his supervisor if he could leave early at 12:23 p.m. The supervisor approved this absence.

On September 27, 2022, the claimant's supervisor granted him a personal leave of absence for that day.

On October 9, 2022, the claimant was charged with driving while his license was barred by the Independence Police Department.

On November 5, 2022, the claimant was scheduled to work. The claimant said he was too sick to work for that day.

On January 5, 2023, the claimant was four minutes late for a shift beginning at 6:00 a.m.

On January 9, 2023, the claimant received a final written warning for attendance. It informed him that he had accrued 8.5 attendance points. The employer provided a copy of this written warning. (Exhibit 6)

On January 18, 2023, the claimant was three minutes late for a shift beginning at 4:00 a.m.

On January 20, 2023, the claimant was charged with driving while his license was barred by the Buchanan County Sheriff. That same day, the claimant was issued a final written warning for attendance. It informed him that he had accrued 8.5 attendance points.¹ The employer provided a copy of this written warning. (Exhibit 6)

On January 26, 2023, the claimant pled guilty to driving while barred on November 5, 2022.

At 8:14 a.m. on February 20, 2023, the claimant left a voicemail stating he had been pulled over and was being taken into custody. At 12:56 p.m., the claimant left another voicemail said he had been released and that he was going to get a doctor's note from his chiropractor in order to be

¹ The claimant received two written warnings due to the way the employer's policy allows points to fall off after a string of non-occurrence. He lost a point due to that. And then gained a point due to an occurrence.

excused. At 3:12 p.m., Ms. Hartsock left a voicemail for the claimant informing him that a doctor's note would not make a difference and requesting that he call her back.

On February 21, 2023, the claimant showed up for work. Mr. Ellis took him back to speak with Ms. Hartsock. Ms. Hartsock explained that the claimant's doctor's note would not make a difference because he called in due to being pulled over and his subsequent arrest. Ms. Hartsock explained that she talked to corporate about terminating him for excessive absenteeism and they agreed with that decision. After being given this explanation, the claimant said, "I guess I should have just lied then." The employer provided Ms. Hartsock's notes of this conversation. (Exhibit 3)

The following section has the findings of fact regarding participation and overpayment issues:

The claimant has not filed or received unemployment insurance benefits after his separation.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged from employment due to excessive absenteeism. The overpayment issue is moot because the claimant has not filed for or received benefits after this separation.

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 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 Code section 96.5(2)b, c and d provide:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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). 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.

This administrative law judge finds the claimant engaged in excessive absenteeism in this case.

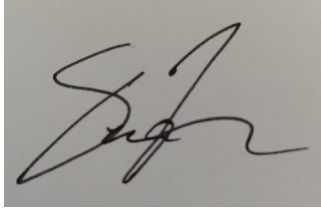
An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. This is a hallmark case for why that can not be the way unemployment law operates. The employer's policy penalizes the claimant for absences on March 27, 2022, May 6, 2022, and November 5, 2022. The administrative law judge cannot find the same because the record reflects the claimant reported he was sick prior to the start of his shift. The circumstance that he lacked a doctor's note is irrelevant to this determination. *Gaborit*, supra. Similarly, the administrative law judge finds the employer has not met its burden to show the times it assessed points against the claimant for "early outs" were not approved by the supervisor. It is understood that the employer assesses points regardless of supervisor approval, but the administrative law judge finds these incidents cannot logically be construed as "misconduct" as defined under Iowa Code section 96.5(2)(defining it as a "deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment.") Merely requesting to leave and leaving upon approval cannot logically fall into the above definition. Nor can the claimant's accrual of a point on September 27, 2022. This was approved by his supervisor and cannot be misconduct.

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. 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).

The claimant had two three-hour minimum duration tardies and two minor tardy incidents before the final incident on February 20, 2023. The claimant had received two final written warnings stressing that he was close to being terminated. In this sense, the point total is relevant in the sense that it stresses the gravity of the situation on the claimant in the absence of other circumstances. Despite that double warning, the claimant had a total absence on February 20, 2023. This reason is not excused. Nor is his justification for court on May 5, 2023. That is because these are the types of absences related to personal responsibility. A string of bad decisions regarding driving and various other things caused these absences. The administrative law finds this full day absence in combination with the tardies as sufficiently excessive to warrant disqualification. Benefits are denied. The overpayment issue need not be evaluated because the claimant has not received benefits.

DECISION:

The March 6, 2023, (reference 01) unemployment insurance decision is REVERSED. 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.

A handwritten signature in black ink on a light gray background. The signature is stylized and appears to read "Sean M. Nelson".

Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

April 4, 2023
Decision Dated and Mailed

smn/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.