

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 04R-UI-07669-H2T
OC: 03-07-04 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 31, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 29, 2004. The claimant did participate along with his witness Fran Timmons and Jim Perky. The employer did participate through Walter Allen, Supervisor Network Operations, and was represented by Sandy Fitch of Employers Unity. Employer's Exhibit One was received.

An additional hearing was held on August 13, 2004 after a remand by the Employment Appeal Board for the taking of additional evidence. The claimant did participate along with his representative Curt Dixon. The employer did participate through, Walter Allen, Supervisor

Network Operations and was represented by Bill Stacek of Employers Unity. Claimant's Exhibits A, B, and C were received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a screening consultant full time beginning September 3, 2002 through January 22, 2004 when he was discharged.

The claimant was discharged from employment due to a final incident of absenteeism that occurred on January 20, 2004. The claimant was last warned on January 8, 2004, that he faced termination from employment upon another incident of unexcused absenteeism. The claimant received a final suspension of three days on January 8, 2004, January 9, 2004 and January 12, 2004. At the time of his suspension, the claimant was warned that one more unexcused absence would result in his termination. Prior absences occurred as outlined on page two of Employer's Exhibit One. Mr. Allen spoke to the claimant on January 20, 2004 and the claimant told him that his alarm had not gone off and he overslept. Mr. Audsley indicated to Mr. Allen during his conversation that his absence was not an FMLA issue. The claimant admitted at the hearing that he overslept. The claimant worked a split shift that day and did work the second part of his split shift beginning at 5:00 p.m. until 8:00 p.m. The claimant's ability to work on January 20, 2004 illustrates that he was not too ill to work on January 20, 2004.

At the hearing held on August 13, 2004, Mr. Allen admitted that the claimant's leave had been subsequently approved as FMLA leave for January 20, 2004. The employer made the decision to discharge the claimant even though they approved his leave under their FMLA policy because the claimant did not properly report or request leave under the FMLA policy. The claimant was required to report his absence from work one hour prior to the beginning of his shift, or by 7:00 a.m. on the morning of January 20. The claimant alleges he was physically unable to report his absence because he was so sleepy from the medication he was taking. Mr. Allen admits that he knew the claimant was having problems with oversleeping due to medications. The newly submitted evidence supports the claimant's contention that he was seeking medical help to adjust his medication to prevent the sleepiness side effect. The claimant's attendance record indicates that the claimant did have many incidents of tardiness and no-call/no-show absences prior to when he began taking the problematic medication in October 2003.

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 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.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

Because the final absence for which he was discharged was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed. The medication the claimant was taking made it impossible for him to report his absence prior to the beginning of his work shift. See, Gimbel v. EAB, 489 N.W.2d 36 (Iowa App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved. When the claimant awoke he called the employer. Because the last absence was for a properly reported illness, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The March 31, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/smc