

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHARLIE FANG

Claimant

TYSON FRESH MEATS INC

Employer

APPEAL 17A-UI-05511-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/30/17

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 19, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 12, 2017. Claimant participated. Employer did not participate.

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 production worker from February 27, 2012, and was separated from employment on April 24, 2017, when he discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. The employer requires employees contact the employer and report their absence at least thirty minutes prior to the start of their shift. Claimant was aware of the employer's policy.

The final incident occurred when claimant was absent from his scheduled shifts from April 17, 2017 through April 20, 2017. Claimant was absent because his wife had to go to Indiana because her grandfather was in the hospital. Claimant and his wife work opposite shifts so that one of them can watch their four children. On April 17, 2017 before his scheduled shift, claimant sent a text message to his supervisor stating that he would be absent from work from April 17, 2017 through April 20, 2017 and he would be back to work on April 21, 2017. Claimant informed his supervisor he had to be at home with his children while his wife was out of state with her grandfather. Claimant's supervisor approved his absence for April 17, 2017, but informed claimant that he needed to come to the plant and talk to the superintendent about being absent on April 18, 19, and 20, 2017. Claimant asked the supervisor to talk to the superintendent, because he could not come to the plant with his kids. Claimant's supervisor told him he had to come to the plant and contact the superintendent. Claimant did not try to call

the superintendent because he did not have the superintendent's number. Claimant called personnel about his absences, but they told him to contact his supervisor. Claimant was unable to have someone else watch his children so he could go to the plant and talk to the superintendent because of complications due to a non-work-related issue. Claimant did not work from April 17, 2017 through April 20, 2017. On April 21, 2017, claimant returned to work, but the employer suspended him pending an investigation regarding his attendance infractions. On April 24, 2017, the employer discharged claimant due to absenteeism. Claimant believes the employer gave him eight points for being absent on April 18, 19, and 20, 2017.

Prior to April 17, 2017, claimant was not aware of how many points he had accumulated. Claimant testified he had points removed in February 2017 and April 2017. Claimant was last warned on June 2016, that he faced termination from employment upon another incident of unexcused absenteeism.

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. Benefits are allowed.

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(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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

An employer’s attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Although claimant was absent from April 17, 2017 through April 20, 2017, his absences were related to properly reported illness or other reasonable grounds. Claimant’s wife had to go to Indiana because her grandfather was hospitalized and claimant was the only other person that was available to watch his four children due to non-work-related issues. Although child care is generally considered a personal responsibility, claimant presented credible testimony that due to his particular circumstances outside of work, he could not have anyone else besides himself or his wife watch the children. Claimant and his wife worked opposite shifts so that one of them would be available to watch the children. Claimant contacted his supervisor on April 17, 2017 and properly reported his absences. Claimant also contacted personnel and informed them about his situation. Because claimant properly reported his final absences and they were due to illness or other reasonable grounds, 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. Furthermore, it is also noted that claimant’s last warning regarding his absenteeism occurred at least nine months prior to his discharge. Benefits are allowed.

DECISION:

The May 19, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs