

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARCUS O SAYLES
Claimant

TYSON PET PRODUCTS INC
Employer

APPEAL 15A-UI-05696-EC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/19/15
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Admin. Code r. 871-24.25(4) – Three No-call/no-show Absences

STATEMENT OF THE CASE:

The claimant/appellant, Marcus Sayles, filed an appeal from the May 11, 2015, (reference 01) unemployment insurance decision that denied benefits based upon his voluntarily quitting work by failing to report for work for three days in a row and failing to notify his employer of the reason. The parties were properly notified about the hearing. A telephone hearing was held on June 23, 2015. The claimant, Marcus Sayles, participated, along with a witness, Cheryl Hubbard. The employer, Tyson Pet Products Inc., participated through Brooke Salger, HR Manager. The employer submitted exhibits which were marked as Exhibits E1 – E3. These exhibits were admitted into the record without objection.

ISSUE:

Was the separation from employment a discharge for misconduct or a voluntary quit without good cause attributable to the employer?

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 laborer from October 22, 2014, until this employment ended on February 18, 2015, when he was a “no-call/no-show” for five consecutive scheduled work shifts. (Exhibit E2; Salger testimony) He worked from 10:00 p.m. to 6:30 a.m., Monday through Friday, and an occasional Saturday. The schedule was posted by noon each Thursday. Employees are expected to check the schedule each week to learn whether or not they are scheduled to work on a Saturday. (Salger testimony)

The employer’s attendance policy requires an employee to call in to a certain number when he or she will be absent from work. This number is printed on the employee ID badges. These badges are used to get into the employer’s facility and to clock in and out of work. (Salger testimony)

The employer's attendance policy includes an assessment of points for absences, and notes whether the absence is excused or unexcused. Fourteen points is grounds for automatic termination. The claimant accumulated twelve points as of February 12, 2015, for a variety of reasons. (Exhibit E2; Salger testimony)

The claimant received a written warning on November 17, 2014, after he accumulated five points. (Exhibit E3) He did not receive any other written warnings.

The claimant last worked on February 5, 2015. He was apparently late that day due to transportation issues. (E2; Sayles testimony) He was absent due to sickness for the next four scheduled work shifts. The claimant was then considered to be a "no call no show" when he did not report to work or call in to report his absence for the next five scheduled work shifts. His employment was terminated on February 18, 2015. (Exhibit E3; Salger testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

Iowa Code § 96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code § 96.5(1)d provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, 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.

Iowa Admin. Code r. 871-24.26(6)b provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(6) Separation because of illness, injury or pregnancy.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

A voluntary quit based on illness is clearly disqualifying except upon the advice of a licensed and practicing physician. *Taylor v. Iowa Department of Job Service*, 362 N.W.2d 534 (Iowa 1985). No such evidence was presented here.

A single unexcused absence does not constitute excessive unexcused absenteeism. *Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). Excessive unexcused absenteeism,

a concept which includes tardiness, is misconduct. *Higgins v. Iowa Department of Job Service*, 275 N.W.2d 187 (Iowa 1984).

Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). However, a failure to report to work without proper advance notification to the employer is generally considered an unexcused absence, even if it is due to illness.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The employer credibly established that the claimant was previously warned that further unexcused absences could result in termination of employment. The final five absences were not excused. The final absence, in combination with claimant's history of unexcused absenteeism, is considered excessive.

The claimant was absent from work for more than three days without giving notice to the employer. The claimant is deemed to have voluntarily quit based on his absence from work for at least three days without giving proper notice to the employer. There is no evidence of good cause attributable to the employer. Benefits are denied.

DECISION:

The May 11, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left the employment without good cause attributable to the employer. 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.

Emily Gould Chafa
Administrative Law Judge

Decision Dated and Mailed

ec/css