

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**TERMAINE TOLES**

Claimant

**APPEAL 21A-UI-00557-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON PET PRODUCTS INC**

Employer

**OC: 09/06/20**

**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 filed an appeal from the November 20, 2020, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he had been terminated for excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on February 9, 2021. The claimant participated. The employer did not participate. The administrative law judge took official notice of the administrative records.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed part-time as a rendering operator from February 2017, until his employment ended on October 13, 2019, when he was terminated. His immediate supervisor was Dennis (last name unknown).

The claimant had a set schedule working from 2:00 p.m. to 10:30 p.m. Monday through Friday. The claimant commuted roughly 35 minutes from Waterloo, Iowa to the plant in Independence, Iowa.

The employer has an attendance policy which assesses points for each infraction. Employees are terminated after they receive 13 points in a rolling year period. If an employee properly reports they will be absent at least 30 minutes prior to their shift, then they are given one attendance point. If they do not properly report they will be absent, then they are assessed three points. The claimant did not know if the policy stated employees were to receive various warnings as they received points. The claimant was aware of this policy because it is explained during orientation.

In the year preceding the claimant's termination, he accumulated ten points for absences he properly reported to the employer at least 30 minutes prior to his shift occurring. The claimant could not specifically describe the reasons for each occurrence, but generally said they were due to transportation problems, family concerns, his illness and the weather. The claimant did not receive warnings for these prior attendance issues.

On October 13, 2019, the claimant was only a couple of minutes late. Dennis told the claimant that day that he had been terminated for attendance because he had accrued too many points under the employer's attendance policy.

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

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to disqualifying misconduct.

Iowa Code § 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 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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.

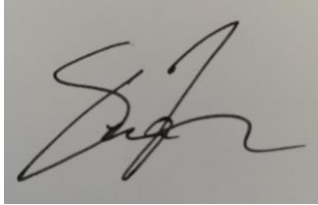
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited 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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; 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 employer terminated the claimant for attendance issues and the final incident was a short tardy incident that occurred on October 13, 2019. It is not clear how many other attendance issues the claimant had which were not excused by reasonable grounds such as illness. The claimant gave several reasons which would not be excuses, such as his reliance on a caretaker for his mother with dementia or his transportation related issues. While it is possible the claimant met this threshold, the administrative law judge concludes to rule against the claimant would be to shift the burden of discharge from the employer to the claimant. The employer had an opportunity to meet that burden here and failed to do so.

**DECISION:**

The November 20, 2020, (reference 01) unemployment insurance decision is reversed. The employer did not provide proof of excessive unexcused absenteeism. Benefits are granted.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is shown within a rectangular frame.

---

Sean M. Nelson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515) 725-9067

February 26, 2021  
Decision Dated and Mailed

smn/lj