

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RONALD JONES
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 20A-UI-14133-SN-T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

OC: 08/02/20
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 October 29, 2020, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he had been terminated for excessive absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on January 6, 2021. The claimant participated. The employer participated through Human Resources Administrator Lori Drenzo. The administrative law judge took judicial notice of the administrative records.

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: The claimant was employed part-time as a rendering operation from November 7 2020, until his employment ended on August 6, 2020, when he was terminated. His immediate supervisor was Senior Supervisor Larry Vander.

The employer has a point system for attendance. Under the policy, employees receive a warning at three points, a written warning at six points, a final warning at nine points, and a termination notice at 10 points. At each warning stage, supervisors have a conversation with the employee about improving their attendance. The employer also has a voicemail system employees are supposed to use to report if they are going to tardy or absent and to give the reasons for the attendance incident. If the employee is just several minutes late, and the employee does not report they will be tardy, then they will receive half of a point. If an employer reports they will be tardy prior to their shift, then half of a point is assessed. If they do not report they will be tardy prior to being absent, then a whole point is assessed. If they report they will be absent for a whole shift, but the absence is otherwise excused by a supervisor, then they are assessed a whole point. If they are absent for a whole shift and they do not report their absence ahead of time, then employees are assessed three points. Points fall off of the employee's record one calendar year from the time in which they occurred. The claimant was aware of the employer's point system.

After the onset of the Covid19 pandemic, the employer required employees to stagger clocking in to reduce the spread of the virus. The claimant said that this resulted in him being tardy by one or two minutes for many of the instances in which he received points. The claimant would be inside the building in the locker room prior to his shift, but would not be at his work station until a few moments after his shift began.

On August 6, 2020, Human Resources Manager Jim Hook, Rendering General Shane Cook, and Senior General John Casey decided to terminate the claimant because he had accrued 10 points from September 20, 2019 to July 31, 2020. These incidents of absenteeism are specifically described below in greater detail.

On September 20, 2019, the claimant received a full point because he called in the day of and was excused by the supervisor from attending that day. Neither party was able to explain why the claimant requested to have that day off.

On December 12, 2019, the claimant received a full point. Ms. Direnzo said it was “probably an unexcused late call” due to the claimant’s inadequate transportation.

On January 17, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On January 31, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On February 7, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On February 21, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On February 28, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On March 1, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On March 7, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On April 3, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On April 9, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On April 10, 2020, the claimant received half of a point. Ms. Direnzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On April 27, 2020, the claimant received half of a point. Ms. Drenzo could not specify whether the claimant called in to report he would be tardy on that day or if he was several moments late.

On July 17, 2020, the claimant received half of a point. Ms. Drenzo said the claimant should have received his final warning after this infraction was assessed against him. Ms. Drenzo did not have a record confirming the claimant received a final warning at that time. The claimant alleged he only received one warning prior to the onset of the pandemic.

On July 23, 2020, the claimant received half a point for being a minute or two late to his work station.

On July 31, 2020, the claimant called to the voicemail and informed it he would be tardy on that day, which resulted in him receiving half of a point.

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.

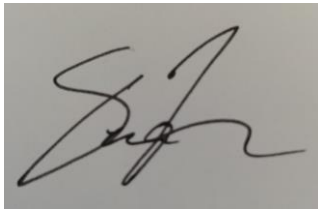
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited 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. This case is an illustration of why the employer's point system cannot be dispositive. The employer assessed points for days in which the claimant reported he would be a few minutes late or was mere moments late to his assigned shift. While these incidents of tardiness would likely not be excused by illness, it does show the claimant did not disregard the employer's interest in having him there on time. The employer's agent could not articulate why the final instance of tardiness, which was demonstrative of the minor attendance issues he accrued over roughly ten and a half months, warranted discharge other than stating it formulaically applied its points policy. In a case like this, when many of the claimant's unreported tardiness incidents

may not even be noticeable to most employers, the employer's burden to articulate how this otherwise minor conduct harmed it is heightened. This employer may have been harmed by the accrual of many otherwise minor tardiness incidents spread out over ten and a half month length of time, but the administrative law judge cannot assume there is significant harm when it is not articulated. While the employer is free to terminate an employee under these circumstances, it has failed to show the claimant's history of attendance incidents constituted willful misconduct. Benefits are granted.

DECISION:

The October 29, 2020, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are granted. The employer's account will be charged.



Sean M. Nelson
Administrative Law Judge
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February 10, 2021
Decision Dated and Mailed

smn/mh