

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JEFF K SPENCE**  
Claimant

**BUILDING PRODUCTS INC OF IOWA**  
Employer

**APPEAL 21A-UI-09395-ML-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/14/21**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.4(3) – Able and Available

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the March 24, 2021 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on June 2, 2021. The claimant, Jeff Spence, participated personally. Kathy Spence, claimant's wife, also provided testimony on claimant's behalf. The employer, Building Products Inc. of Iowa, registered a telephone number, but did not answer when the administrative law judge called. The employer did not call in to participate prior to the closing of the evidentiary record. Therefore, the employer did not participate in the hearing.

**ISSUE:**

Did claimant voluntarily quit the employment with good cause attributable to employer?  
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 laborer. Claimant was employed from approximately April, 2013, until January 14, 2021, when he was discharged from employment for excessive absenteeism. Claimant's immediate supervisor was Chad Norman. The employer did not participate in the hearing. As such, there is no evidence of an attendance policy or a no call/no show policy in the evidentiary record.

According to claimant, he was discharged after he failed to present to work the week of January 11, 2021.

Mr. Spence was on medical leave from approximately December 10, 2020, through January 8, 2021. He was discharged from his facility and returned home on January 9, 2021. Mrs. Spence contacted the employer a few days before and notified Amanda Buhrow that her husband was

going to be released from his facility on January 9, 2021. Mrs. Spence also relayed that her husband was scheduled to see his primary care provider shortly thereafter to determine whether he would be able to return to work.

Unfortunately, claimant became ill with Covid-like symptoms on or about January 9, 2021. Claimant called Rahil Shaikh, M.D., his primary care physician, to let him know of the same on January 11, 2021. Dr. Shaikh told claimant not to come in for his appointment, and treated claimant as though he had the COVID-19 virus. Dr. Shaikh provided claimant with a work release that excused him from work through January 24, 2021 due to his symptoms. On January 25, 2021, the work release was extended to January 31, 2021.

Claimant testified that he or his wife provided Dr. Shaikh's office with the employer's fax number. Claimant and his wife were under the impression that Dr. Shaikh's office was faxing claimant's medical excuses to the employer. Mrs. Spence testified that Dr. Shaikh's office could not confirm whether they had faxed the medical excuses to the employer.

Claimant testified he first learned that he had been terminated when he received paperwork in the mail for COBRA insurance. After receiving the paperwork in the mail, claimant contacted his employer to confirm his employment status. Claimant subsequently presented to the employer's place of business with copies of the medical excuses he believed Dr. Shaikh's office had been faxing to the employer all along. Claimant asked if he could have his job back, but the employer declined.

Claimant had no prior absences and no warnings for absenteeism.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

In this case, the employer did not participate in the evidentiary hearing. Employer did not testify or provide any evidence in this case. The employer did not provide dates of absenteeism. While claimant believes he was terminated for absences the week of January 11, 2021, the employer did not provide information regarding the absences or whether claimant properly reported his absences. As such, there is no evidence that claimant had any unexcused absences.

Alternatively, Mrs. Spence testified that she told Ms. Buhrow that claimant could not return to work unless and until Dr. Shaikh cleared him for the same. Ms. Buhrow was aware of the condition precedent to claimant's ability to be placed back on the schedule. Based on the evidence available in the record, it appears any absences between January 11, 2021, and January 31, 2021, were for reasonable grounds and were properly reported. Therefore, the absences were excused and do not constitute misconduct.

The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify him from receiving benefits. Benefits are allowed.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

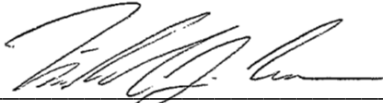
The claimant has the burden of proof in establishing his ability and availability for work. *Davoren v. Iowa Employment Security Commission*, 277 N.W.2d 602 (Iowa 1979). When employees are unable to perform work due to a medical condition, they are considered to be unavailable for work.

Claimant was kept off of work by his primary care physician from January 13, 2021, through January 31, 2021. He was unavailable for work and disqualified from receiving unemployment benefits for the three benefit weeks ending January 30, 2021.

**DECISION:**

The March 24, 2021 (reference 01) unemployment insurance decision is REVERSED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

The claimant was not able and available for work for the three benefit weeks ending January 30, 2021.



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Michael J. Lunn  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515)478-3528

June 28, 2021  
Decision Dated and Mailed

mjl/scn