

IOWA DEPARTMENT OF INSPECTIONS & APPEALS  
Division of Administrative Hearings  
Wallace State Office Building  
Des Moines, Iowa 50319

**Appeal Number:** 14IWDUI106  
**OC:** 2/2/14  
**Claimant:** Appellant (1)

**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**SHAWN M. HOLMAN**  
**702 KITTERMAN CIRCLE**  
**NORWALK, IA 50211**

**IOWA WORKFORCE DEVELOPMENT**  
**JON NELSON**  
**1000 E. GRAND AVE.**  
**DES MOINES, IA 50309**

JONI BENSON, IWD

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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May 30, 2014

(Dated and Mailed)

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**STATEMENT OF THE CASE**

Shawn M. Holman filed an appeal from a decision issued by Iowa Workforce Development ("IWD") dated March 7, 2014 (reference 01). In this decision, IWD determined that Mr. Holman was not eligible to receive unemployment insurance benefits. The decision stated that Mr. Holman was discharged from work on November 22, 2013, for excessive unexcused absenteeism after being warned. Mr. Holman's employer was Iowa Workforce Development.

The case was transmitted from IWD to the Department of Inspections and Appeals on March 28, 2014, to schedule a contested case hearing. A Notice of In-Person Hearing was mailed to all parties on April 11, 2014. On May 12, 2014, the Appellant requested a continuance in order

to obtain discovery from the Respondent. The Respondent had no objection to a continuance. The continuance was granted and the hearing, originally scheduled for May 16, 2014, at 10:00 a.m., was converted to a telephone status conference in order to set a new in-person hearing date. On May 15, 2014, at or around 3:14 p.m., the Respondent provided the Appellant with the requested documents via email. The next morning, May 16, 2014, the Appellant asked to go forward with the hearing. As the hearing room was no longer available, the Appellant was informed that the hearing would have to go forward as a telephone hearing on that date, or a new date and time could be set for an in-person hearing. I reminded the Appellant that he had a right to an in-person hearing and one could be scheduled for a later date and time. The Appellant chose to go forward with the hearing via telephone at the originally scheduled date and time. The Respondent had no objection to proceeding in that manner.

Therefore, on May 16, 2014 at 10:00 a.m., an appeal hearing via telephone was held before Administrative Law Judge Tricia A. Johnston. IWD representative Gary Bateman represented IWD, and presented testimony. Shawn Holman appeared personally and presented testimony on his own behalf. IWD submitted Exhibits A and B, which were admitted as evidence in the case. Appellant submitted a 164-page document which was labeled at hearing as Exhibit 1. This document was also admitted as evidence in the case.

### **ISSUE**

Whether the claimant was discharged for misconduct and is, therefore, ineligible to receive unemployment insurance benefits.

### **FINDINGS OF FACT**

Mr. Holman worked for the Iowa Workforce Development as an ITS 4 for the ACES team. He was transferred to the IT department under Gary Bateman on August 1, 2013, from the LMI division along with a group of other programmers as part of a reorganization effort. His work involved programming system architecture. His regularly scheduled work hours were from 8:00 to 4:30, Monday through Friday. He occasionally covered other shifts. Mr. Bateman stated that he was advised in the packet he received upon Mr. Holman's transfer that Mr. Holman had some attendance problems. He was informed that Mr. Holman had already received a written reprimand and a one-day suspension due to attendance issues in June of 2013. (Bateman testimony).

While working under Bateman's supervision, Holman had a few absences where he would not come in to work for a day or two and did not report in. There were some days when Holman reported that he would not be in and some days he didn't report at all. (Bateman testimony).

Bateman testified without dispute from Holman that Holman's absences were as follows:

#### **August, 2013:**

- August 26, 2013, a Monday, Holman did not come to work, but did notify co-worker Foshier that he was out. Foshier sent a notice that Holman was out that day.
- August 27, 2013, Holman did not notify anyone of his absence and did not come to work.
- August 28, 2013, Holman notified Foshier that he would be out the rest of the week.
- August 29 and 30, 2013, Thursday and Friday, he did not notify anyone he would be out.

#### **September, 2013:**

- September 2, 2013, the following Monday, was a holiday.
- September 3, 2013, Holman was out again without notifying anyone.

- September 4, 2013, Holman returned to work. Bateman called him to the office. Bateman told him he was new to the department and he knew he had attendance problems in the past. Bateman informed Holman that he would need to contact the help desk when he was out. He told him to let them know if he was going to be out. Holman said he would do so.
- September 23, 2013, Holman was out and did not call in.
- September 25, 2013, Holman was out but did not call in on this date.
- September 26, 2013, Holman was out but did notify a teammate who sent a message.

**October, 2013:**

- October 17, 2013, Holman was out and did not notify anyone.
- October 21, 2013, Holman was out and did not notify anyone.
- October 22, 2013, Holman was out and did not notify anyone.
- October 28, 2013, Holman was out but did call a teammate and notified him he was out.
- October 29, 2013, Holman was out and did not notify anyone.
- October 30, 2013, Holman was out and did not notify anyone.
- October 31, 2013, Holman was out and did not notify anyone.

**November, 2013:**

- November 1, 2013, Holman was out and did not notify anyone.
- November 4, 2013, Holman was out and did not notify anyone.
- November 5, 2013, Holman returned to work. Bateman reminded Holman that this was what they had talked about. Holman was out for six days, five of which he hadn't notified them of his absence. Bateman told Holman that this was job abandonment. Holman asked Bateman for one last chance. Bateman gave him a ten-day suspension as his notice of last chance. They signed the paperwork and Holman left.
- November 5 through November 18, 2013, Holman was suspended from work.
- November 19, 2013, Holman returned to work.
- November 21, 2013, Holman was out and did not call anyone. (Bateman testimony).

As noted above, Bateman warned Holman on September 4, 2014, about his attendance problems and informed him that he would need to contact the help desk when he was going to be out. On November 5, 2013, following six days of absence, only one of which was reported, he was given a notice of last chance and was suspended for 10 days. One day after returning to work from his ten-day suspension, Holman was again out and did not contact anyone to report his absence. (Bateman testimony).

On Friday, November 22, 2013, Holman called Bateman at 9:30, an hour and a half after he was due to be at work, saying he guessed he no longer worked there. He asked Bateman if he should come in and turn in his badge. Bateman told him to come in. Bateman stated at hearing that he was under the impression Holman was coming in to resign. When Holman came in, Bateman told him he violated his last chance agreement. He gave Holman the opportunity to quit rather than be fired. Holman told Bateman he'd rather he terminate him. (Bateman testimony).

Holman testified that when he was fired on November 22, 2013, Bateman told him that if he didn't voluntarily quit, he would never be able to put the State of Iowa on his resume. That was not the first time he was supposed to resign. He stated they tried to make him resign three times. One of his coworkers witnessed it but he didn't want to be fired so Holman didn't involve him in this hearing. (Holman testimony).

Bateman stated at his hearing that he would have accepted notices of absence from Holman by email or by phone. He stated he would prefer Holman call, but he would accept text or email. (Bateman testimony). Holman verified that he knew Bateman's personal phone number, work phone number and email. Holman asserted multiple times during his hearing that he was instructed to call the help desk and did not believe Bateman would have accepted a text or email. He acknowledged that he did not try to contact Bateman by these methods. Holman testified that he was told he had to call the help desk and was told not to email the help desk. Whenever he called the help desk, he sat on hold. He stated he thought Bateman was a "by the book guy" and since Bateman told him to call the help desk he wouldn't accept any other means of communication. (Holman testimony).

Holman testified as to his personal situation during this time period. During the time he was still reporting to his prior work supervisor, "Jude," prior to being transferred to Bateman, he caught his wife in bed with a neighbor. At that time, he asked for a leave of absence but Jude didn't want him to take a leave. Jude stated he would prefer Holman work with him and make an appearance every day and do the things he needed to such as attending meetings. Holman built the system and Jude knew that under union rules, if he took a leave of absence he couldn't keep giving knowledge to the ACES team. That is why Jude did not want him to take a leave of absence. (Holman testimony).

Holman was in a truck accident on August 26, 2013. He swerved to miss a deer on a gravel road, flipped his truck and broke his leg in two places. He reported his absences at that time by letting the ACES team know. He would just send Chris a text or an email. That was before he was told he was supposed to go through the help desk. After he wrecked his truck, Bateman told him he had to call the help desk to report absences. He felt other members of his team were treated differently and they were allowed to email the help desk whereas he was told he had to call. With Jude, he would send a text saying he was taking Family Medical Leave Act time (FMLA) that day. He testified, however, that he first obtained FMLA following this accident and was still covered at the time he was fired. (Holman testimony).

Bateman and Holman both testified that Holman was covered under FMLA during the months of August through November. (Bateman testimony; Holman testimony). Holman stated he had FMLA for depression, anxiety, accident and sinus issues. Holman stated the terms of his FMLA did not indicate any flexibility with calling in. He was informed by the Department's Human Resources Officer, Monica Reynolds, that in order to use FMLA he had to use the Department's call-in procedures. She told him he had to call in by 7 a.m. or before to the help desk in order to take FMLA for that day. He tried to call the help desk but there was no answering machine between 6:30 and 8:00. He was not aware at the time that there was an answering machine for that line before 6:30 a.m. When he would call in, he would be on hold for 45 minutes. He stated he felt like this was a lose-lose situation and at times he just said, "screw it" and hung up. Holman stated there were times he would sit there for 15 minutes, then hang up the phone and go back to bed feeling it was already too late. (Holman testimony).

Holman stated that when all of this was going on, he was so depressed he didn't care about any of this. He felt he could have filed grievances but he didn't. He stated he was depressed and just wanted to hide. He was still upset about his personal issues the day he was fired. He was still having problems with his emotional issues while working under Bateman. He stated that when he got fired, he spent the best part of the next several months sleeping. He was not able to function at all due in part to medication issues. He was depressed. He had no care, ambition, drive or tenacity. (Holman testimony).

He stated that prior to this period of time, every review he had at work was "exceeds

expectations.” This was not his normal behavior. Holman wasn’t intentionally trying to do anything wrong. He felt that if union procedures had been followed at the time of his transfer, all of this would have been known about his situation. He reported to his EAP counselor during this time and his counselor was giving status updates to Jude. He stated he worked hard for them and when he needed a leave of absence and some understanding, he felt he did not get that. (Holman testimony).

Since he was fired he has applied for a lot of jobs but they don’t believe he was fired for just missing work. He also has a felony conviction from 2003. After he got out of prison, he went to college and got a job from the State and is now on a “do not hire” list. (Holman testimony).

Holman submitted Exhibit 1 at his hearing, in support of his position that he was treated disparately from other coworkers regarding reporting leaves of absence. He stated that after he was gone, Jing Zhang took a leave of absence to China and was just able to send an email and extend her leave for another week. (see below at 4/21/14). On August 26 and 28, 2013, he was letting Chris and Monica know he was not going to be as he was going to the doctor. Monica told him she couldn’t do anything until FMLA was finalized. Chris forwarded the information about his absence to the help desk. (see below at 8/26/13 and 8/28/13). (Holman testimony; Exhibit 1).

The relevant pages from Exhibit 1 are outlined in chronological order as follows:<sup>1</sup>

- 8/26/13 – email from Foshier to IWD HelpDesk – Holman will not be in today, due to illness.
- 8/28/13 – email from Foshier to IWD HelpDesk – Holman will not be in today.
- 8/29/13 – email from Bateman to Foshier asking for Shawn’s phone number so he could call and check up on him.
- 9/26/13 – email from Msuya to IWD HelpDesk – Holman called to tell him he is still sick with sinus issues. He has been in queue on the help desk number so he called him.
- 10/18/13 – email from Foshier to IWD HelpDesk – Msuya is out sick today.
- 10/28/13 – email from Foshier to IWD HelpDesk – Holman is out sick today.

(post-termination documents)

- 1/2/14 – email from Foshier to IWD HelpDesk – he is out sick and will not be in.
- 1/3/14 – email from Foshier to IWD HelpDesk – he is out sick and will not be in.
- 1/21/14 – email from Foshier to IWD HelpDesk – Msuya called and will be in late.
- 1/21/14 – email from Foshier to IWD HelpDesk – Jing Turner will be in later due to appt.
- 1/23/14 – email from Foshier to IWD HelpDesk – he will be working from home.
- 2/4/14 – email from Foshier to IWD HelpDesk – he will be leaving at 1.
- 2/11/14 – email from Msuya to IWD HelpDesk – he will be staying home.
- 2/17/14 – email from Foshier to IWD HelpDesk – he will be working from
- 2/20/14 – email from Msuya to IWD HelpDesk – he is leaving early due to weather.
- 3/5/14 – email from Msuya to IWD HelpDesk – he will be leaving at 2 p.m. today.
- 3/14/14 – email from Foshier to IWD HelpDesk – Msuya called to say he will be in at 9.
- 3/17/14 – email from Foshier to Max Cates and IWD-IT Bureau – he is here. Somehow

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<sup>1</sup> These documents represent all of the references to reports of employees being absent or late that were contained in Exhibit 1. The majority of these documents are from dates following Mr. Holman’s discharge and are included herein due to Mr. Holman’s position that they support his argument that he was treated differently from other employees who were allowed to email the help desk or call other team members.

the IT calendar has him off for the last few weeks. Also list of absent employees.

- 3/20/14 – email from Msuya to IWD HelpDesk – he is leaving at 4 p.m.
- 3/26/14 – email from Msuya to IWD HelpDesk – he is leaving at 3 today.
- 3/27/14 – email from Foshier to IWD HelpDesk – Msuya is running late.
- 4/8/14 – email from Msuya to IWD HelpDesk – leaving at 4. lists other staff absences.
- 4/21/14 – email series between Bateman and Jing Zhang regarding extending stay.
- 4/24/14 – email from Msuya to IWD HelpDesk – he will be leaving at 3:30 p.m.

(Exhibit 1).

Holman stated the HelpDesk would not consistently notify members of employee absences. There were times when they laughed about it in ACES, how they were not sure why it took a month at a minimum to send out notices, and that there were times when the Department didn't even know if members of the ACES team were in the office or not. The Help desk would send memos out but sometimes they would have to send a text to the help desk three or four times before they sent message out. (Holman testimony).

Holman said he was not informed that it was acceptable to email the helpdesk. He stated he was "pretty sure" the instructions were to call. He questioned whether progressive discipline was used in his case, stating that a review of the documents demonstrates that there were attempts to continue to get a hold of the help desk and he couldn't get through. If he was able to let somebody know and had a fair and reasonable way of contacting somebody he shouldn't have been punished. He stated he even offered to work for free for these guys. He should have been able to just notify a guy on the team if he couldn't make it in. Even after he was fired, he would help the ACES team whenever they had questions. (Holman testimony).

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

An individual is disqualified from receiving unemployment insurance benefits if he has been discharged for misconduct in connection with employment.<sup>2</sup> The employer has the burden of proving that the claimant is disqualified from receiving benefits because he was discharged for misconduct.<sup>3</sup>

Misconduct is a deliberate act or omission which constitutes a material breach of the employee's duties and obligations. It is limited to conduct which demonstrates willful or wanton disregard of an employer's interest, such as deliberate violation or disregard of standards of behavior that the employer has the right to expect, or recurrent careless or negligence that shows an intentional and substantial disregard of the employer's interests or the employee's obligations. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, isolated incidents of ordinary negligence, and good faith errors in judgment are not misconduct.<sup>4</sup>

The Department's regulations provide that "excessive unexcused absenteeism" constitutes misconduct, except where an employee is absent because of illness or "other reasonable grounds" and properly reports the absence to the employer.<sup>5</sup> Habitual absenteeism as a result of "matters of purely personal responsibilities," such as transportation, can constitute

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2 Iowa Code § 96.5(2) (2013).

3 Iowa Code § 96.6(2) (2013).

4 871—Iowa Administrative Code (IAC) 24.31(1).

5 871—IAC 24.32(7).

misconduct.<sup>6</sup> Whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.<sup>7</sup> A discharge for misconduct, however, cannot be based on a past act or acts. The misconduct must be a current act.<sup>8</sup>

There is no doubt in this case that Mr. Homan had a significant history of unexcused absenteeism prior to his final absences on September 20 and 21, 2013. The challenge for IWD is to prove that Mr. Holman's final absence, that which triggered his termination, was unexcused and excessive. While past acts can be considered for purposes of determining the magnitude of the current violation, the current act must constitute misconduct in order to disqualify the claimant.<sup>9</sup>

Mr. Holman had two prior warnings regarding his absenteeism. He was warned by Mr. Bateman on September 4, 2013, that he was expected to contact the help desk to report any absences in the future. Holman stated he understood. Holman was again warned on November 5, 2013, after a significant period of unreported absence, that he was required to report any absences and that this was his last chance. Bateman indicated they signed an agreement and Holman did not dispute that at hearing. Holman was given a ten-day suspension due to his excessive absenteeism. Finally, upon return from his suspension, Holman worked one day before failing to come to work and failing to report his absence on November 20, 2013. He was again an hour and a half late the next day in contacting his employer, who he called directly at 9:30 a.m., to find out if he still had a job.

Bateman testified at hearing that he would have accepted text or email as well as calling, while Holman maintained he had to call in. Holman demonstrated he knew how to contact Bateman directly in the event he needed to discuss his absences with him. The record is clear that other employees knew they could email the help desk or contact their coworkers regarding their absences. Bateman's testimony regarding Holman's absences demonstrates that on the dates Holman contacted other employees to report his absence, he did not deem this as an unreported absence. Even if Holman felt he had to contact the Help Desk, on multiple occasions when he was waiting on hold he said "screw it", hung up and made no attempt to contact his employer in any other way.

Our courts have found the existence of excessive unexcused absenteeism where a former employee was late several times without calling to advise his employer that he would be late<sup>10</sup> and where former employees failed to show up and did not make any attempt to contact their employers.<sup>11</sup> Mr. Holman was given clear directives about his absenteeism and demonstrated his ability to contact Mr. Bateman directly. He admitted at hearing that he had Mr. Bateman's email, phone numbers and the email and phone number of the help desk, as well as other team members. When he could not get through on the help desk phone line, he made no attempts to communicate his absence in any other way to his employer.

Although Holman was covered under FMLA at the time of his firing, that did not free him from the obligation to contact his employer to report a covered absence. The Code of Federal Regulations governing FMLA indicates that "an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally

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<sup>6</sup> *Harlan v. Iowa Dep't of Job Serv.*, 350 N.W.2d 192, 194 (Iowa 1984).

<sup>7</sup> *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984).

<sup>8</sup> 871—IAC 24.32(8).

<sup>9</sup> *Id.*; *Flesher v. Iowa Department of Job Service*, 372 N.W.2d 230, 234 (Iowa 1985).

<sup>10</sup> *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

<sup>11</sup> *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989); *Armel v. Employment Appeal Bd.*, 743 N.W.2d 871 (Iowa App. 2007).

should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."<sup>12</sup> Holman did not contest this at hearing, stating he understood that he had to report his absences per Departmental policy in order to claim an FMLA-covered absence.

There is sufficient evidence in the record to show that Mr. Holman's absences on September 20 and 21, 2013, constituted misconduct. An individual is disqualified from receiving unemployment insurance benefits if he has been discharged for misconduct in connection with employment.<sup>13</sup> The employer has the burden of proving that the claimant is disqualified from receiving benefits because he was discharged for misconduct.<sup>14</sup> Mr. Bateman has met his burden of proof in this case.

### **DECISION**

Iowa Workforce Development's decision dated March 7, 2014 (reference 01), is AFFIRMED. Mr. Holman was appropriately discharged for misconduct and is not entitled to unemployment insurance benefits. IWD shall take any action necessary to implement this decision.

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<sup>12</sup> 29 CFR 825.303(a) (2013).

<sup>13</sup> Iowa Code § 96.5(2) (2013).

<sup>14</sup> Iowa Code § 96.6(2) (2013).