

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVIE L HOPSON
Claimant

SHEARERS FOODS BURLINGTON LLC
Employer

APPEAL 17A-UI-07137-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/18/17
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 July 12, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on July 31, 2017. The claimant, Stevie L. Hopson, participated. The employer, Shearers Foods Burlington, L.L.C., registered a participant but did not answer when called for the hearing. Per claimant's request, Employer's Exhibits 1 through 4 were received and admitted into the record.

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: Claimant was employed full time, most recently as a machine operator, from October 18, 2013, until April 24, 2017, when he was discharged for exceeding the number of allowed attendance points. Claimant's final absence occurred on April 23, 2017. He was not able to come to work because he had car trouble returning from vacation. He notified the employer via telephone call and text message prior to the start time of his shift. Claimant was absent on January 4, 2017; December 3, 2016; and November 10, 2016; all due to personal illness. He was late to work and only worked partial days on October 9, September 18, September 12, and June 5, all in 2016. Claimant testified that he was likely late to work because he overslept.

The employer's attendance policy states that any employee who incurs eight attendance occurrences within a rolling calendar eight-month period will be discharged from employment. (Exhibit 4) The policy indicates that an employee will receive a documented warning or counseling at four, five, six, and seven attendance points. Claimant admits that he received several warnings for attendance during his employment. On November 11, 2016, the employer issued claimant a second written counseling because of his attendance. (Exhibit 1) On December 5, 2016, the employer issued claimant a final written occurrence for his attendance.

(Exhibit 2) He was told that he was at seven occurrences at that time, and the next step would be suspension or discharge. On January 5, 2017, the employer issued claimant a second written counseling because of his attendance. (Exhibit 3) Claimant was told at the time he was discharged that he was at 9.5 attendance occurrences. Claimant denies he received any warning or had any other absences between January 5, 2017, and his discharge from employment.

REASONING AND CONCLUSIONS OF LAW:

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

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(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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 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, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

While an employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged claimant contrary to the terms of its own policy, which does not call for termination until after eight points are accumulated. While claimant testified he was told that he was at 9.5 attendance occurrences at the time he was discharged, there is no indication those occurrences were issued fairly, based on claimant's testimony and the employer's documentation. Disparate application of the policy cannot support a disqualification from benefits. The employer has not met the burden of proof to establish misconduct. Benefits are allowed

DECISION:

The July 12, 2017 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn