

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSEPH I DOERING
Claimant

NESTLE USA INC
Employer

APPEAL 16A-UI-11117-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/19/16
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the October 5, 2016 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 27, 2016. The claimant, Joseph I. Doering, participated personally. The employer, Nestle USA Inc., did not participate.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a wash operator. He was employed from June 3, 2013 until September 21, 2016. His job duties included cleaning totes and running the machines.

The employer has a verbal policy in place regarding absenteeism which provides that if an employee is absent for 10 days, they will be subject to discharge. The employer has a point system wherein two points are assessed for each date that an employee is absent. Once an employee reaches 20 points, they are discharged. The claimant was discharged for absenteeism. Claimant was made aware of the policy when he first began his employment.

Claimant was originally hired to work a set schedule. He was working from 8:00 a.m. to 8:00 p.m. on Monday, Tuesday, Friday and Saturday on one week and then the next week he worked those same hours but on Sunday, Wednesday and Thursday. He worked this schedule for approximately two years. In April of 2016, the employer changed claimant's schedule and he was working various shifts (including the overnight shift) with little notice. He would also be scheduled to cover various co-worker's vacation and sick days.

Claimant is a single parent and cares for his two-year old son. Since the change from a set schedule to a varied schedule the claimant was absent on eight occasions due to the fact that

he could not find someone to care for his minor son in the evenings. Because these shifts were overnight, he was unable to take his son to traditional daycare or babysitters. He did speak to his mother and his son's mother on each of these occasions to determine if they could care for his son, but they were unavailable to do so.

Claimant's final absence was on Monday, September 19, 2016 when he was scheduled to work from 12:00 a.m. to 8:00 a.m. He learned about this schedule on Thursday, September 15, 2016. Claimant was unable to find someone to care for his son during this night shift. He did call and properly report his absence, however, the employer still considered the absence to be unexcused. Claimant was discharged on September 21, 2016 for this absence on September 19, 2016. During the discharge meeting claimant asked if he could voluntarily resign instead and he was allowed to sign documentation that he was quitting. However, he would have been discharged if he had not voluntarily resigned. Prior to his discharge claimant had received previous notices stating at what level of attendance points he had accumulated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

As a preliminary matter, I find that Claimant did not quit. Even though claimant signed a voluntary quit notice, he did so only to avoid being discharged. Had he not voluntarily quit, he would have been discharged. As such, this is a forced quit and will be analyzed as a discharge 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(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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. (emphasis added). 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.*

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

In this case, the claimant had eight absences from April of 2016 through September of 2016 (approximately five months). The claimant knew that he needed to come to work for his scheduled shifts and was aware he could be subject to discharge if he went over 20 points. Even though claimant properly reported each of his absences, they were not for good cause. Lack of childcare is not considered a good cause reason which would be an excused absence. *Higgins*, 350 N.W.2d at 191 (Iowa 1984). Claimant's eight unexcused absences in five months are excessive.

While it is admirable that the claimant is caring for his minor son as a single parent and there are certainly struggles that arise due to that situation, the final absence, in combination with the claimant's history of unexcused absenteeism does amount to job-related misconduct. Benefits must be denied.

DECISION:

The October 5, 2016 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as he is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/