

The employer has a written attendance policy that required Mr. Schmitt to notify his supervisor or another supervisor within 30 minutes of the scheduled start of his shift if he needed to be absent. On March 2, 2004, Mr. Schmitt signed his acknowledgment of the attendance policy. Another provision of the attendance policy required Mr. Schmitt to maintain a 97 percent attendance rate.

The final absence that prompted the discharge occurred on September 12, 2005, when Mr. Schmitt notified the employer prior to the start of his shift that he would be absent due to illness. Mr. Schmitt was suffering from cold and/or flu symptoms, had a sore throat, and found it painful to speak. Mr. Schmitt's job required him to speak on the telephone for 10 hours. Mr. Schmitt had been absent due to illness the previous day and had properly notified the employer. Mr. Schmitt's most recent absence due to matters other than illness properly reported to the employer occurred on August 7, 2005, when Mr. Schmitt was tardy due to car trouble.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Schmitt was discharged for misconduct in connection with his employment based on excessive unexcused absences. It does not.

Iowa Code section 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.

871 IAC 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.

871 IAC 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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate,

intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Schmitt's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that Mr. Schmitt's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Mr. Schmitt's final absence was an excused absence. The evidence establishes that Mr. Schmitt's absence the previous day was also an excused absence. The evidence establishes that Mr. Schmitt's most recent unexcused absence occurred more than a month prior to the discharge. The evidence in the record fails to prove a "current act" of misconduct that might provide a basis for disqualifying Mr. Schmitt for unemployment insurance benefits. See 871 IAC 24.32(8). Accordingly, Mr. Schmitt is eligible for benefits, provided he is otherwise eligible, and the employer's account may be charged for benefits paid to Mr. Schmitt.

Having concluded there was no current act of misconduct, the administrative law judge need not address whether prior absences were unexcused or excessive.

DECISION:

The representative's decision dated September 29, 2005, reference 01, is affirmed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

jt/kjw