68-0157 (9-06) - 3091078 - EI

NICHOLAS P DELAGARDELLE
Claimant

APPEAL NO. 07A-UI-10411-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GEARHEAD ENTERPRISES INC
Employer

OC: 09/23/07   R: 03
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 2, 2007, reference 02, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on November 29, 2007. Claimant participated. Employer participated through Kent Williams.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time shipping clerk from 2005 until September 4, 2007 when he was discharged. Medical excuse for August 28, 29, and 30, 2007 dated August 28 by Allen Hospital was for pneumonia. Claimant offered it to Williams and manager Jason Schmidt and it was refused. He had not been warned either in writing or verbally that his job was in jeopardy for any reason.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Claimant's testimony is credible because employer's vague testimony about dates differed from his fact-finding statement and separation date stated on the protest. Because the final absence for which claimant was discharged was related to properly reported and medically excused illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The November 2, 2007, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css