

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

STEVEN F TURNER
Claimant

SCE PARTNERS LLC
Employer

APPEAL 15A-UI-07799-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 06/14/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 29, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on August 6, 2015. The claimant participated with Frank Tenuta, attorney at law. The employer participated through Sarah Andersen, human resources manager. No exhibits were offered or admitted.

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: The claimant was employed full-time as a table games dealer and was separated from employment on June 12, 2015, when he was discharged for excessive unexcused absenteeism.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The point values are determined based on how much notification the employee provides the employer of the absence. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving 12 points in a rolling 12-month period. The claimant was made aware of the employer's policy at the time of hire. The claimant received warnings on November 13, 2014, December 13, 2014 and April 25, 2015.

The claimant's attendance occurrences and points were attributed as below:

September 25, 2014	4 points
November 3, 2014	2 points
November 16, 2014	1 point
February 6, 2015	1 point
February 21, 2015	1 point
April 25, 2015	2 points
June 7, 2015	2 points

Total: 13 points

The claimant's final absence was as a result of his car being stuck in the mud, approximately 40 miles away from the work place. The claimant was en route to work when it became stuck. The claimant notified the employer of the issue approximately one hour and 30 minutes prior to his shift, and was unable to make it in to work, or arrange alternate transportation. Even if the claimant had called hours before his shift, he still would have received one point, which would have caused him to point out. He was subsequently discharged.

The claimant attributed his remaining points to service connected post-traumatic stress disorder (PTSD). The claimant had once spoken with human resources in the past six months, who made the claimant aware that he was not eligible for FMLA. At the hearing, Ms. Andersen testified that had the employer been aware of the claimant's condition, they could have tried to establish an unconventional leave of absence, that may reduce the disciplinary action taken for absences related to a medically verifiable illness of PTSD. The claimant was unaware of this possible option and had spoken both to human resources and his manager about his PTSD during his employment.

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.

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.

In an at-will employment environment 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, it incurs potential liability for unemployment insurance benefits related to that separation.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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 employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.

The evidence presented in this case establishes that only one attendance occurrence on September 25, 2014, was as a result of the claimant's failure to properly notify the employer ahead of the scheduled shift. In addition, Mr. Turner credibly testified that nearly all of his absences were attributed to his service connected PTSD, which would be considered excused absences in the context of unemployment law because they were both properly reported and for illness. Finally, the final absence was properly called off, approximately one hour and 30 minutes before his scheduled shift, and for reasons beyond the claimant's control, and thereby excused.

Because the claimant's absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment

insurance law has not been established in this case. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The June 29, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs