

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VIRGIL E SCHMIDT
Claimant

APPEAL NO. 08A-UI-03015-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE RIVER TERMINALS
Employer

**OC: 02/24/08 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 17, 2008, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on April 10, 2008. Claimant participated. Employer participated through Arein Winkler and Steve Cavanaugh.

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 mechanic from January 8, 2007 until February 18, 2008 when he was discharged. The last incident occurred on February 18 when he called to report it he could not leave his driveway due to a large snowdrift and would report to work as soon as the snowplow cleared it. Before the snowplow cleared the drift he was notified he was fired. He lives outside of Monmouth, Iowa, and commutes about 38 miles one way to work. He was last warned about attendance on February 12, 2008 and was given other written warnings on April 25, 2007 and January 28, 2008. A coworker called employer for both of them due to weather conditions on February 6 and 8, 2008. He also missed work due to weather conditions on December 28, 2007 and February 12, 2008. He is unsure of the reasons for missing work on April 10 and 12, and October 26, 2007. All other absences were related to personal illness or injury and his daughter's medical emergency that resulted in her giving birth prematurely.

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.

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.

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. Although transportation issues are generally the responsibility of the employee, in the last instance, calling to notify the employer he would be late until a snowplow could remove the large drift from his driveway was not unreasonable given the circumstances. Because the final absence is considered excused, no current act of misconduct has been established and no disqualification is imposed.

DECISION:

The March 17, 2008, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css