

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON KRIEVALDT
Claimant

APPEAL NO: 13A-UI-10627-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION
Employer

OC: 08/18/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jason Kriewaldt (claimant) appealed an unemployment insurance decision dated September 12, 2013, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Burke Marketing Corporation (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 9, 2013. The claimant participated in the hearing. The employer participated through Terry Ubben, Human Resources Manager and Shelli Seibert, Human Resources Generalist. Employer's Exhibits One through Three were admitted into evidence.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time grind room laborer from October 29, 2012 through August 20, 2013. He was discharged from employment due to violation of the employer's attendance policy with final incidents on August 19 and 20, 2013. The claimant notified his supervisor via Facebook on August 19, 2013 that he was going to be absent due to animal control problems or going to jail. He sent a message at 1:30 a.m. on August 20, 2013 stating that he had to be in court at 8:00 a.m. to deal with a warrant and that he was pretty sure he pointed out. He wrote, "I have had an awful fucking day and that is just the icing on the cake."

The employer's attendance policy provides for termination once an employee accumulates four attendance points for unexcused absences. In addition to the final two absences, the claimant received 2.5 points for absences due to illness and another half point for requesting off work on December 22, 2012. Warnings were issued on August 28, 2012 and August 12, 2013.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on August 20, 2013 for 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(7).

The Iowa Supreme Court in the case of *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct and includes tardiness, leaving early, etc. The Court in the case of *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of "personal responsibility such as transportation problems and oversleeping are considered to be unexcused."

Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant had three unexcused absences and three absences that were due to illness. There is no evidence to confirm whether or not the absences due to illness were properly reported so it must be assumed they were. Consequently, these absences are not unexcused which leaves three unexcused absences in a nine-month period. While the employer properly discharged the claimant in accordance with its policy, work-related misconduct has not been established under the unemployment insurance laws. Benefits are allowed.

DECISION:

The unemployment insurance decision dated September 12, 2013, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css