

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

RONALD STINSON
801 – 37TH ST NE
CEDAR RAPIDS IA 52402

CRESTVIEW ACRES INC
1485 GRAND AVE
MARION IA 52302

Appeal Number: 06A-UI-00200-BT
OC: 12/11/05 R: 03
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Ronald Stinson (claimant) appealed an unemployment insurance decision dated January 3, 2006, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Crestview Acres, Inc. (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 24, 2006. The claimant participated in the hearing. The employer participated through John Mulder, Administrator. Employer's Exhibits One through Three were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time certified nurse's aide from December 21, 2000 through December 12, 2005. He was discharged from employment due to excessive unexcused absenteeism with a final incident that occurred on December 10, 2005. The claimant properly reported his absence due to illness on that date but stated he would provide a doctor's excuse and did not provide one.

The claimant had been on probation twice for attendance. From January 21, 2005 through December 21, he was late 69 days and was a no-call/no-show on six days. He was placed on probation for 30 days on April 5. The claimant also had numerous absences due to illness, and, because of the excessive amount, the employer began requesting doctor excuses. On September 30, the claimant called in sick and was told he needed a doctor's note. He reported he could not afford to go to the doctor and was advised he could be assessed by a nurse at work so that his absence would not count against him. The claimant refused and the absence was unexcused. He was placed on a 60-day probation on October 3, 2005.

The final warning issued for the probation advised him that he could have one unexcused absence per month but further read that he would be discharged for two unexcused absences. He was informed he could always report to work to be assessed by a nurse if he was going to be absent due to illness. From the date of his last warning to the date of discharge, he was tardy nine times, but the employer viewed tardiness somewhat differently. The claimant had an unexcused absence on October 25 when he was absent due to illness but did not present a doctor's excuse or present to be assessed. He had an unexcused absence on November 30 when he initially reported he would be late but never showed for work. He had two absences in December and the first of those was on December 7. This absence was due to illness, and there is no indication a doctor's note was provided, although he reported he was going to a doctor. The second absence was on December 10, 2005, and it resulted in his termination.

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 section 96.5-2-a.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

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. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on December 12, 2005, for excessive unexcused absenteeism.

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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

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). Due to the claimant's excessive

absences in the case herein, he was required to present either a doctor's note for absences due to illness or to report to work for a medical assessment, which would serve the same purpose. The claimant testified he could not afford to go see the doctor but also refused to be assessed by a co-worker. He stated that the co-worker could not treat him but that was not the purpose of the assessment. He further stated that it was a violation of his privacy to be seen by someone at work. Naturally, it is the claimant's prerogative not to be seen, but it appears if it was going to make the difference between saving his job or losing it, he would have opted to be assessed.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The claimant's contention that he was unaware that his job was in jeopardy is not supported by the facts in this case. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The unemployment insurance decision dated January 3, 2006, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

sdb/kjw