

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BOYD R JOHANNINGMEIER
Claimant

APPEAL 17A-UI-00898-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE PATCH BOYS OF CEDAR RAPIDS
Employer

**OC: 12/18/16
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 20, 2017, (reference 04) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 15, 2017. Claimant participated and was represented by Alisa Diehl, Attorney at Law. Employer participated through Lincoln Prins, Owner and Adam Shew, Manager. Employer's Exhibits A through I were entered and received into the record. Claimant's Exhibits 1 and 2 were entered and received into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a drywall technician beginning on September 26, 2016 through December 21, 2016 when he was discharged. The claimant had some issues with his job performance early in his employment, but after coaching by the employer his performance improved.

The claimant either called in or sent a text message to his manager, Mr. Shew, indicating that he was ill and unable to work due to illness on November 25, 28 and December 1, 2, 5 and 6. Under the employer's policy it is acceptable for an employee to either call or send a text message to Mr. Shew to report an absence from work. The claimant's absences were properly reported to the employer.

On December 7, the claimant arrived at the shop for work. Employees are scheduled and sent to assignments based on a scheduling ap that is on their cell phones. The claimant's scheduling ap malfunctioned and he was not able to see where he was to go to work that day. He called Mr. Shew but did not get an answer. When his ap malfunctioned and Mr. Shew did not answer his phone, the claimant left the shop and went home. He was verbally counseled on that occasion that he should have called Mr. Prins to find his work assignment instead of

leaving. Both parties agree the app on the claimant's cell phone malfunctioned leading to the situation. That same day Mr. Prins gave the claimant a one-dollar per hour pay raise.

On November 9, Mr. Shew visited the claimant and his co-worker Paul at a job they were performing out of town in Iowa City. When Mr. Shew arrived at the job site around 11:00 a.m., the claimant was working on replacing the alternator in his truck. His truck was parked in the customer's driveway. Paul told Mr. Shew that the claimant had been working on his truck for some time. When Mr. Shew left the job site he reminded the claimant to make sure he punched back in on the time clock after he finished working on his truck. The claimant made no comment to Mr. Shew's statement that he punch back in when he returned to work. Employees punched in and out of work on an app that was on their cell phones.

On December 17, while reviewing the claimant's attendance records with Mr. Shew, Mr. Prins learned of the incident on November 9 where the claimant was working on his truck during the work day. The employer's payroll records show that on November 9 the claimant punched in at 6:43 a.m. and out at 4:48 p.m. The claimant was working on his truck while he was on the clock being paid by the employer. Mr. Prins knew of the claimant's time card falsification on December 17. At that time he could not decide whether to discharge the claimant or not. The business was very busy and Mr. Prins needed the claimant to keep working. The claimant worked on December 19. On December 20, the claimant sent a text message to Mr. Shew indicating he was ill and unable to work. He properly reported his absence on December 20. When the claimant called in sick on December 20, that was the proverbial straw that broke the camel's back and Mr. Prins made the decision to discharge the claimant. The last incident that led to the discharge was his absence due to properly reported illness.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. 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). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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.

The employer did not make the decision to discharge the claimant after he learned of the claimant's falsification of his time card. Instead, the employer chose to let the claimant continue working because he was short-staffed and the business was busy. Thus, the claimant's time card falsification on November 9 cannot be considered the final act of misconduct. Instead the employer made the decision only when the claimant called in sick again on December 20. The claimant's absence on December 20 was properly reported. The final incident that led to the decision to discharge was an incident of absence due to properly reported illness on December 20.

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. Because the final absence for which he was discharged was related to properly reported illness or injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The January 20, 2017, (reference 04) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs