

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JERMAINE FORD
Claimant

CURLYS FOODS
Employer

APPEAL 16A-UI-05755-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/01/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 19, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for excessive unexcused absenteeism and tardies. The parties were properly notified of the hearing. A telephone hearing was held on June 9, 2016. The claimant, Jermaine Ford, participated and testified. The employer, Curlys Foods, participated through human resource supervisor, Ester Andrade. Employer's Exhibits 1-5 were received into evidence.

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: Claimant was employed full time as a cookhouse chill operator from July 17, 2015, until this employment ended on May 2, 2016, when he was discharged.

The employer has an attendance policy in place which provides for termination after employees accumulate 12 points within a 12-month time period. Employees are assessed a half point if they arrive to work late or have to leave early, one point for calling in absent, and two points if they are a no-call/no-show. Disciplinary warnings are issued at eight and ten points and termination occurs when 12 points are accumulated.

By December 29, 2015, claimant had been tardy or had to leave work early five times and called in four times, twice because he was sick. On January 5, 2016, claimant was issued an Attendance Review showing he had accumulated six and half points. (Exhibit 5). The form also included a review of the attendance policy and warning that accumulating 12 points would lead to termination. By the end of January 2016 claimant had left work early and called in sick once more, putting his attendance points at eight. Claimant was issued disciplinary action for his attendance on January 28, 2016. (Exhibit 4). The disciplinary action again warned that the accumulation of 12 points would result in termination.

The employer testified, on April 1, 2016, claimant was presented with a disciplinary notice indicating that since January 28, he was late on February 14, a no-call/no-show on March 22, and absent for personal reasons on March 23, putting him at 11.5 points. (Exhibit 3). The disciplinary notice again advised claimant of the attendance policy and warned that accumulating 12 points would result in termination. Claimant testified he did not sign the document and does not know how his signature came to appear on the document. Accordingly to claimant, on April 1, 2016, he was approached by his supervisor, Rouque Gonzales, and advised that he was at 11.5 points. Three days prior, claimant had received another disciplinary notice, showing he was considered to have left early on March 22, accumulating only half a point. (Exhibit A). On March 22 claimant arrived at work and punched in 15 minutes early, but then punched out three minutes after his scheduled start time. The employer's records show claimant did not inform his supervisor he was leaving, so his absence was changed from leaving early to a no-call/no-show, which is the change Gonzales was informing during their April conversation.

On May 2, 2016, claimant was again late to work. Claimant testified he was late because he had a flat tire on his way to work. Claimant did not call and notify the employer that he was going to be late to work in accordance with the employer's policies. According to the employer's records this tardy put claimant at 12 points and he was discharged in accordance with the attendance policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Excessive absences are not considered misconduct unless unexcused. 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. 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 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work.

Claimant was tardy or left work early nine times in approximately eight months. Claimant had three other unexcused absences during this time. Claimant was warned multiple times that the accumulation of additional absences or tardies would result in termination. Claimant was most recently advised that he was getting close to the allowable number of absences in April 2016. Even if the claimant did not agree with the accuracy of the number of points the employer had on record for him, he was made aware that he was only a half point, one tardy, away from termination. Nevertheless, claimant was late to work again on May 2 and made no attempt to call the employer to tell them he was going to be late. The employer has established that the claimant was warned that further improperly reported unexcused absences could result in termination of employment and the final tardy was not properly reported as excused. The final tardy, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The May 19, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/pjs