

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**KEVIN S. KING  
304 E. MAIN ST.  
BRIGHTON, IA 52540-9434**

**WEST LIBERTY FOODS LLC  
P.O. BOX 318  
WEST LIBERTY, IA 52776-0318**

**DIA APPEAL NO. 20IWDUI0165  
IWD APPEAL NO. 20A-UI-03274**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**APPEAL RIGHTS:**

**This Decision Shall Become Final**, unless within fifteen (15) days from the mailing date below the administrative law judge's signature on the last page of the decision, 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:

***Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
or  
Fax (515) 281-7191***

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.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

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.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

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**IOWA WORKFORCE DEVELOPMENT**

**ONLINE RESOURCES:**

UI law and administrative rules: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-law-and-administrative-rules>

UI Benefits Handbook: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-handbook-guide-unemployment-insurance-benefits>

Handbook for Employers and forms: <https://www.iowaworkforcedevelopment.gov/employerforms>

Employer account access and information: <https://www.myiowaui.org/UITIPTaxWeb/>

National Career Readiness Certificate and Skilled Iowa Initiative: <http://skillediowa.org/>

**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**Kevin S. King**  
Claimant

**West Liberty Foods LLC**  
Employer

**DIA APPEAL NO. 20IWDUI0165**  
**IWD APPEAL NO. 20A-UI-03274**

**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 03/15/20**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

Kevin S. King filed an appeal from an April 10, 2020 (reference 01) decision denying unemployment insurance benefits. The parties were properly notified of the hearing. The hearing was originally convened on May 12, 2020, but was continued to May 26, 2020 at Claimant King's request. The hearing convened on May 26, 2020. Claimant King appeared and testified. He represented himself. Human Resources Supervisor Monica Dyar appeared and testified for Employer West Liberty Foods LLC.

The following documents from West Liberty Foods were admitted into evidence:

Employer Ex. 1 – Employee Timecard Report

Employer Ex. 2 – February 21, 2020 Ashlee Ramer Email

Employer Ex. 3 – Claimant Call-in Log

Employer Ex. 4 – Attendance Pointsystem Count – 7 points

Employer Ex. 5 – November 26, 2019 Points re Kevin King

Employer Ex. 6 – 11/26/2019 Email from Melissa Stiffler re Kevin King attendance

Employer Ex. 7 – West Liberty Foods Attendance Discussion with Kevin King

**ISSUES:**

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Kevin S. King began working for Employer West Liberty Foods LLC on August 12, 2019. He worked as a "decaser." He worked 40 hours a week, from 3:30 p.m. to 12:30 p.m.

West Liberty Foods had an attendance policy that included accumulating negative points for absences. If an employee accumulated eight points, his or her employment would be terminated. Claimant King was advised of that policy during orientation and it was explained in an employee handbook given to him when he started work. He was also advised of the policy for calling in when he was not going to come to work. (King & Dyar Testimony, Employer Ex. 7).

Mr. King incurred frequent absences over the course of his employment from August 12, 2019 through February 19, 2020. He was absent on the following days for which he accumulated negative points. The points and his stated reason for being absence are set forth below:

- August 26 – 1 point (personal reasons – car problems);
- September 3 - 1 point (left work 4 hours early, feeling ill);
- September 9 – 1 point (personal reasons – car problems);
- September 10 – 3 points (no call/no show, he claimed car problems);
- November 1 through 19 point – 1 point (he was out for surgery, confusion about being cleared to work, Employer ultimately assigned only 1 point);
- February 19 – 1 point ( left work early, feeling ill);
- February 20, 21, 24 - no call/no show

(King & Dyar Testimony, Employer Ex. 1, 4-7).

When Claimant King had accumulated 7 points as of the end of November 2019, his supervisor met with him to discuss the points. Claimant King signed an “Attendance Discussion” document on November 26, 2019, showing he was told he had accumulated 7 points, and when he reached 8 points during a 12-month period, his employment would be terminated. Claimant King does not dispute that he had accumulated seven points by the end of November 2019. (Dyar & King Testimony, Employer Ex. 7).

On Monday, February 17, when he was out on a break, Claimant King suffered what he called a “severe panic attack.” His blood pressure was high, he was shaking, and having difficulty breathing. He talked to his supervisor. After being “left alone” for about an hour and a half, he was able to finish his shift. (King Testimony).

He worked February 18, 2020 with no problems. On February 19, 2020, he started feeling dizzy and thought he was starting to have another panic attack. He talked to his immediate supervisor, “J.R.,” at about 5:30 p.m., and asked if he left early, would he be “pointing out.” Claimant King contends that J.R. told him yes. Claimant King contends that when he left West Liberty that day, he believed that his employment had been terminated. (King Testimony, Claimant Appeal).

West Liberty asserts that Claimant King’s employment was not terminated that day. (Dyar Testimony).

Ashlee Ramer, West Liberty’s Occupational Health & Safety Specialist/Worker’s Compensation Manager, got a call from “J.R.” on February 19, 2020 at about 5:30 p.m. She went to see him in the “North Bullpen” and Claimant King was with there. J.R. told OSHA Specialist Ramer that Claimant King reported he was feeling weird and was having chest pains similar to what he experienced on Monday, February 17. Claimant King immediately said he was feeling fine and only wanted to know how many attendance points he had. He then said when he felt strange like he did on Monday when he had a panic attack. Claimant King then asked if he was at 7 points, and walked out of the office. When he left without putting on his personal protective equipment, Specialist Ramer followed him and asked that he put it on. He said the equipment had a hole in it. She advised him he still needed to put it on. When Specialist Ramer and J.R. did not see Claimant King after that, they assumed he had left work. (Employer Ex. 2).

Claimant King called West Liberty on February 20, 2020. Specialist Ramer contends that Mr. King talked to someone and said he was calling to see if he had been “pointed out.” Because he mentioned that he believed he had been exposed to chemical, the message was passed along to Specialist Ramer. She called him and asked what was going on. He told her that he believed he was continuously exposed to anhydrous ammonia, it had made him sick, and he was going to call OSHA. He stated he felt so sick he had to pull over on his way home after leaving work on February 19. Claimant King told Specialist Ramer that he believed someone was “sabotaging” him by putting ammonia on his gloves while he was on break. (King Testimony, Employer Ex. 2).

Specialist Ramer contends that Claimant King then hung up on her, after stating she was “the girlfriend of the guy I don’t like.” Specialist Ramer started an investigation of Mr. King’s claims. (Employer Ex. 2).

At hearing, West Liberty Human Resources Supervisor Dyar reported that Claimant King talked to her on February 20. When he raised exposure concerns, she forwarded his call to OSHA Specialist Ramer’s phone. Ms. Dyar denies she told Mr. King that his employment had been terminated. She contends that J.R. did not “fire” Mr. King because he does not have the authority to do so. She told Claimant King during their call that he needed to either come in and/or call in for work that day, February 20, and thereafter. He did not come to work or call in before his scheduled shift time on February 20, 21 or 24. (Dyar Testimony, Employer Ex. 2).

After three days of no call/no show, West Liberty contends that Claimant King voluntarily quit his employment. Human Resources Supervisor presented call records that do not show where Mr. King called in. The records record call-ins by employee clock numbers. (Dyar Testimony, Employer Ex. 3).

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge finds that the Claimant voluntarily quit without good cause attributable to the employer and was not discharged from employment.

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(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Id.* at 191.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be

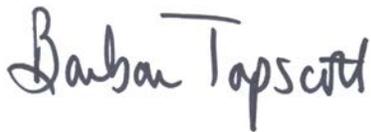
the minimum amount in order to determine whether these repeated acts were excessive. Furthermore, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this matter, the evidence in the record shows that Claimant King had accumulated seven attendance points as of the end of November 2019. He left work early on February 19. He did not show up for work, nor did he call in, on the scheduled work days of February 20, 21 and 24 – despite being told to do so by Human Resources Supervisor Monica Dyar. While Claimant King claims his employment was terminated as of February 19, the evidence shows otherwise. Claimant King is considered to have voluntarily quit his employment without good cause attributable to the employer and is not entitled to unemployment benefits.

For these reasons, the undersigned concludes that Mr. King's request for benefits must be denied. According to the administrative record, benefits were also denied by the IWD representative's decision dated April 10, 2020 (reference 01) and no overpayment exists.

**DECISION:**

The April 10, 2020 (reference 01) unemployment insurance decision is AFFIRMED. Claimant King voluntarily quit his employment. Benefits are denied.



Barbara Tapscott, Administrative Law Judge  
Department of Inspections and Appeals, Administrative Hearings Division

June 4, 2020

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Decision Dated and Mailed

BMT:lb

CC: Kevin S. King (by first class mail)  
West Liberty Foods LLC (by first class mail)  
Nicole Merrill (email)  
Joni Benson (email)

*Note to Claimant:* This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.