

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**BRANDON WINSTON**  
Claimant

**MERCY HOSPITAL**  
Employer

**APPEAL 21A-UI-03831-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/10/20**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 22, 2021, (reference 03) unemployment insurance decision that denied benefits based upon the conclusion he was discharged for excessive unexcused absenteeism on August 11, 2020 after being warned. The parties were properly notified of the hearing. A telephone hearing was held on March 18, 2021. The claimant participated. The employer did not participate.

**ISSUES:**

1. Whether the claimant's separation from employment was disqualifying?
2. Whether the claimant is able and available for work effective August 11, 2020?

**FINDINGS OF FACT:**

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

The claimant was employed full-time as an environmental services floor tech from October 2019, until this employment ended on August 10, 2020, when he was terminated. The claimant's immediate supervisor was AVS Supervisor Rod Neuvil. The claimant worked a set schedule, but the schedule changed several times over the course of his employment. Prior to April 2020, the claimant started work at 4:00 a.m. and ended his shift at 12:20 p.m. In the beginning of April 2020, the claimant's schedule changed to 6 a.m. to 10:30 a.m. Monday through Friday.

The employer had an attendance policy. It said employees were required to call in to a dedicated attendance line at least two hours prior to their shift in line or provide a doctor's note to their direct supervisor. It was up to the supervisor's discretion whether these absences would be excused. The attendance policy was progressive in nature and issued four or five warnings prior to resulting in termination of the employee. The claimant was not sure how many levels the attendance policy had or when each level of discipline was issued. The claimant is generally aware of this policy because he believed the employee handbook.

Early on in his term of employment, the claimant was told by several of Neuvil's subordinates that it was not a big deal if he arrived late for his scheduled shift. They also told the claimant "there was nowhere for him to be that early in the day." The claimant believes Ms. Munson changed the employer's lackadaisical stance because he walked out of diversity training presentation of Jane Elliott's Brown Eyes / Blue Eyes. Specifically, the claimant took issue with Ms. Elliott's use of the words "nigger" and "negro." The claimant did not specify why he believed this led to Ms. Munson's discipline of tardy incidents.

At some point prior to the summer of 2020, the claimant received two warnings from Mr. Neuvil. The claimant could not remember even which month he received these warnings or the level or warning he received. Although the claimant could not say which absences resulted in these warnings, he is confident he received them for absences he either properly reported ahead of time as caused by an illness or provided a doctor's note.

On July 6, 2020, the claimant received a final written reprimand from Manager of Environmental Services Stacey Munson. The reason the claimant received this warning was because he had been arriving later than his scheduled start time. Specifically, Ms. Munson told the claimant he "had to start getting here on time." The claimant could not remember which days in particular the employer stated he was late. The claimant generally admitted he had been late to several shifts because had difficulty arranging his schedule to correspond with his childcare. Despite it being a final warning and Ms. Munson's stern warning to arrive on time in the future, the claimant did not believe his job was in jeopardy.

In late-July or early-August 2020, the claimant had been late several times, including one that was a week prior to his termination date. The claimant does not believe any of these tardy incidents was more than 10 minutes in duration. These were caused by the difficulty the claimant had with securing childcare and relinquishing custody to the mother of his child. The claimant did not let the employer know he was going to be late on the days he was tardy.

On August 10, 2020, the claimant met with Ms. Munson and Human Resources Generalist Cathy Kopecky. Ms. Munson presented him with a termination notice stating he was being terminated because of ongoing attendance concerns, specifically late arrivals. During the meeting, the claimant admitted he had been coming in late, but he excused it as being related to the logistics of obtaining childcare and relinquishing custody to the mother of his child under the new schedule.

## **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(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.

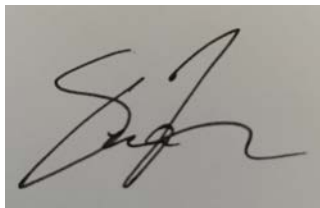
Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for 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. The record has established that the claimant was warned that further improperly reported unexcused absences could result in termination of employment and the final absence was not properly reported excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld. Since the claimant is disqualified from benefits, the issue regarding whether he is able and available for work is moot.

**DECISION:**

The January 22, 2021, (reference 03) unemployment insurance decision is affirmed. The claimant was discharged due to job-related misconduct. The claimant was discharged from employment due to job-related misconduct. 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.



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Sean M. Nelson  
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March 22, 2021  
Decision Dated and Mailed

smn/scn