

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JAY D HOBBS**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 17A-UI-06463-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/04/17**  
**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 June 22, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for leaving work without permission. The parties were properly notified of the hearing. A telephone hearing was held on July 14, 2017. The claimant participated and testified. The employer participated through Hearing Representative Barbara Buss and witnesses Jeff Kent, Gary Kline, and Ian Luehring. Employer's Exhibits 1 through 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 part time as an order selector from June 9, 2016, until this employment ended on May 30, 2017, when he was discharged.

The employer has a points-based attendance policy in place. Employees are allowed up to nine attendance points within a rolling nine-month period before they are terminated. Verbal warnings are issued once an employee reaches four and five points, and written warnings are issued after six points. Employees are suspended if they receive seven points. Claimant was aware of the attendance policy.

On May 27 and 28, 2017, claimant left work early without permission. Claimant left on May 27 because he was behind on his production and knew he would only continue to get further behind. Claimant believed it would be better to leave work early than to continue to get behind. Claimant notified Kline he was leaving and was advised by Kline, that unless he was sick, he would be given points, as there was still work to do. Claimant confirmed he was not sick, but was leaving. On May 28 claimant left early because he was tired. Claimant was asked by Luehring if he was ill and confirmed he was not, but was too tired to work and was going home.

On May 30, 2017, Kent phoned claimant and advised him that he was being separated from employment for leaving work early on May 27 and 28.

Prior to the incidents on May 27 and 28, claimant had several warnings about his attendance. (Exhibit 3). The employer testified the most recent warning had been prepared on May 22, 2017, but had not yet been presented to the claimant. Claimant was, however, presented with a warning on May 5, 2017 regarding his attendance. The warning identifies five incidents where claimant was absent between October 1, 2016 and May 5, 2017. The warning also advised claimant that if his attendance did not improve, he may be terminated. Claimant had also received warnings for his attendance on July 28 and August 6, 2016. These warnings identify an additional five absences between July 8 and August 1, 2016. Claimant testified three of these absences were due to an injury and that he properly reported them as such to the employer. Claimant further testified the remainder of his absences were due to illness or because he had to deal with personal business. Claimant declined to explain what personal business he was dealing with. Claimant could not specifically recall what absences, or how many, were due to illness, but estimated it was around 90%. The employer did not have a record as to why claimant was absent on any of these occasions.

#### **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. Claimant was absent from work at least ten times in less than a year. Claimant provided credible testimony that at least three of these absences were due to an injury and were properly reported. Of the remaining absences claimant could not recall how many were due to illness and how many were due to personal business. Absences attributable to personal responsibility are not excused. Absences where no excuse is given at the time of the absence and none is given in the record are similarly not excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)(emphasis added); see *Spragg v. Becker-Underwood, Inc.*, 672

N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). Claimant's seven remaining absences are therefore unexcused. Claimant then left work early on May 27 and 28. While claimant may have properly reported to his supervisors that he was leaving early on these dates, the reasons he left are personal in nature and are therefore not excused. Claimant was issued warnings for his attendance on at least three occasions prior to his separation. The employer has established claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

**DECISION:**

The June 22, 2017, (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.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs