

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VALENTINO L CLEMONS
Claimant

APPEAL 21A-UI-23254-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PREPARED FOODS INC
Employer

**OC: 09/05/21
Claimant: Appellant (2)**

Iowa Code § 96.5(1) - Voluntary Quit
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 October 15, 2021, (reference 02) unemployment insurance decision that denied benefits based upon a September 8, 2021 discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on December 10, 2021. Claimant, Valentino Clemons, participated. Employer, Tyson Prepared Foods Inc, failed to call the toll-free number listed on the hearing notice at the time of the hearing and therefore did not participate in the hearing. Judicial notice was taken of the administrative file.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the administrative law judge finds: Claimant was employed full-time, with a set schedule, with overtime, as a laborer. His start date was in October 2019 and his last day worked was September 7, 2021. He was separated from employment on September 7, 2021, in a meeting with someone from Human resources and the night plant superintendent. He was told he pointed out (points over 14) and was being fired.

Claimant's last incident was on September 3, 2021, when claimant called in to work to advise he was going to be two hours late to work due to an issue involving his son. Claimant ended up not coming in to work.

Employer did not participate in the hearing. Part of the administrative file is the fact finding documents and employer submission for the fact finding. Part of that documentation is a list of all attendance events, with a June 18, 2021 print date called "Final Attendance Notification" and a September 7, 2021 print date called "Discharge" that have been examined. The following events are not excusable events under the law: September 3, 2021, June 28, 2021, December 12, 2020 and November 6, 2020. All other events listed were either leave of absences, claimant being

sick, employer stating the attendance issue was either excused or no points were assigned (meaning it was excused) or it was worked off, granting it an excused status.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for reasons other than misconduct.

Iowa Code section 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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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 twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). 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. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

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. While the employer's policy may allow the attendance issues to be called unexcused, most all of the absences are excused for purposes of unemployment insurance benefits, such as absences due to illness or an emergency that was properly reported.

The employer's documents establish claimant had four unexcused absences from November 2020 through September 2021. While the employer may have had good reasons to let claimant go, there was no disqualifying reason established by employer, and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The October 15, 2021, (reference 02) unemployment insurance decision is **REVERSED**. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Darrin T. Hamilton
Administrative Law Judge

January 13, 2022
Decision Dated and Mailed

dh/mh