

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**FELIPE LOPEZ**

Claimant

**APPEAL 16A-UI-08684-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JOHN MORRELL & CO**

Employer

**OC: 07/17/16**

**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.4(3) – Ability to and Availability for Work

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the August 5, 2016 (reference 01) unemployment insurance decision that disallowed benefits due to excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on August 26, 2016. The claimant, Felipe Lopez, participated personally and through an interpreter from CTS Language Link. The employer, John Morrell & Co., participated through Human Resources Supervisor. Employer's Exhibits 1 – 5 were admitted.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?  
Is the claimant able to work and available for work effective July 17, 2016?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as material handler. He was employed from April 17, 2008 until July 5, 2016. Claimant's immediate supervisor at the time of separation was Lee Botoger. Mr. Botoger's supervisor was Glen Barker.

The employer has a written policy in place regarding absenteeism. See Exhibit 5. The claimant received a copy of this policy. See Exhibit 5. The policy provides that if an employee reaches twelve points in a twelve month rolling period then the employee will be discharged. See Exhibit 5. The policy also provides that if an employee is unable to report to work as scheduled or will be late reporting to work, he/she must notify the Company prior to start of shift *when advance notice of the absence was not given*. See Exhibit 5 (emphasis added).

The claimant was discharged effective July 5, 2016 for absenteeism. See Exhibit 1. Claimant received a written warning regarding his absenteeism on June 9, 2016. See Exhibit 4.

Claimant was absent or tardy on the following dates: July 11, 2015; July 14, 2015; August 5, 2015; September 12, 2015; October 8, 2015; November 17, 2015; November 28, 2015; January

2, 2016; March 8, 2016; May 9, 2016; May 11, 2016; June 4, 2016; June 17, 2016; June 22, 2016; June 30, 2016; July 1, 2016; and July 5, 2016. See Exhibit 2.

On June 23, 2016 claimant notified Mr. Botoger that he received a call his niece was terminally ill with cancer and that he needed to visit her in California to address custody issues with her two minor children. Claimant had vacation time to use and requested his vacation time off be approved. He indicated that he would return to work on July 11, 2016. Claimant's request for vacation was denied. Claimant then spoke with Mr. Botoger's supervisor, Mr. Barker, and again asked if his request for vacation could be granted so that he could travel to California to address his niece's health and custody issues. Mr. Barker denied his request. Claimant spoke to a woman who worked in the human resources department about his leave request. He was told by this woman that he needed to get approval from his supervisor and that she did not have any decision making authority about his leave request.

Claimant informed both Mr. Botoger and Mr. Barker that he was going to go to California. He travelled to California on June 30, 2016. He returned to Iowa and reported back to work on July 11, 2016. He was escorted out of the factory when he returned to work by a woman from human resources stating that he was no longer allowed to be there.

Claimant is able to and available for work.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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 is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but

not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that claimant's testimony that he notified his supervisors of his absences prior to leaving work is credible.

In this case the claimant properly reported that he was going to be absent on July 5, 2016 when he spoke to his supervisors about the denial of his vacation leave request. The absence on July 5, 2016 was due to him having to travel to California to participate in a legal proceeding regarding custody of his niece's two minor children as well as spending time with his terminally ill niece. Claimant's absences on June 30, 2016 and July 1, 2016 were due to the same reason. These absences are for good cause and notice was provided pursuant to the employer's written policy.

As such, there is no current act of misconduct that would disqualify claimant from receiving benefits. Further, claimant is able to and available for work. Benefits are allowed.

**DECISION:**

The August 5, 2016 (reference 01) unemployment insurance decision disallowing benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Claimant is able to and available for work. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

---

Dawn R. Boucher  
Administrative Law Judge

---

Decision Dated and Mailed

db/