

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

DONNELL P MAYS
Claimant

APPEAL NO. 08A-UI-02369-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

K MART CORP
Employer

OC: 01/20/08 R: 04
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 29, 2008, reference 02, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on March 25, 2008. Claimant participated. Employer participated through Connie Ernst.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time overnight stocker from October 30, 2007 until January 17, 2008, when he was discharged. Employer does not know the last day he worked. Claimant called the main number on Monday, January 14, and spoke to someone in the cashier area with access to the work schedule who told him he was supposed to work next on Wednesday, January 16. When he reported to work on January 16, night manager Cindy questioned him about why he was not at work the day before, Tuesday, January 15. He was not allowed to work on Wednesday and was sent home. General manager Jeff called him on Thursday, January 17, and told him he was fired. Claimant had missed work on December 20 because his vehicle was out of service and was absent on November 16 with documentation for a funeral he attended in Chicago. Employer testified claimant was issued a written warning on November 16, the same day employer records show he was absent.

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.

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.

871 IAC 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.

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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

Employer's records are internally contradictory, as it claims to have warned claimant on the very day it said he was absent. Furthermore, the general manager and night supervisor both accused claimant of missing work on Tuesday, January 15, not Wednesday, January 16, as argued at hearing. While there may be some date discrepancy by both parties, employer has the burden of proof to credibly establish job misconduct. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A failure to report to work without notification to the employer is generally considered an unexcused absence, however, one unexcused absence is not disqualifying, since it does not meet the excessiveness standard. In this case, claimant's absence related to lack of transportation is unexcused, the funeral was excused, and since there is contradictory evidence from employer about when the warning was issued and the date of the last absence and no information about when he was actually scheduled to work, employer has failed to meet its burden of proof to establish disqualifying misconduct. Benefits are allowed.

DECISION:

The February 29, 2008, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw