

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**EDUARD ROJAS CUENCA**  
Claimant

**PACKERS SANITATION SERVICES INC**  
Employer

**APPEAL 20A-UI-05952-BH-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 04/26/20**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Eduard Rojas Cuenca appealed the June 11, 2020 (reference 01) unemployment insurance decision that denied benefits. The agency properly notified the parties of the hearing. The undersigned presided over a telephone hearing on July 10, 2020. Rojas participated personally and testified. Packers Sanitation Services, Inc. (PSSI) did not participate. David Morante served as the interpreter.

**ISSUE:**

Did PSSI discharge Rojas for job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the undersigned finds the following facts.

Rojas worked for Tyson for a period of time. Then PSSI hired Rojas in or around October of 2018. Rojas worked for PSSI at a Tyson plant full time as a trainer.

PSSI requires employees to call in when they are sick. The employee leaves a message on an automated system stating the reason for the absence. Employees typically would bring in a doctor's note regarding absences due to health issues when they returned to work. However, because of the COVID-19 outbreak, doctors were faxing notes directly to employers instead of hand-writing them for hand-delivery to employers by employee-patients.

Rojas had a respiratory issue at the end of April and beginning of May. He obtained treatment. At the time, Buena Vista County was unable to get COVID-19 tests, so Rojas's doctor was unable to administer such a test on Rojas. Nonetheless, Rojas's doctor instructed him to quarantine at his home for fourteen days without interacting with other people because he believed Rojas likely had COVID-19.

On May 1, 2, and 4, 2020, Rojas was scheduled to work. He called in sick and left a message. On May 4, Rojas believed his doctor had faxed in the note regarding his need to quarantine for fourteen days. After that, Rojas did not call in.

Rojas discovered his doctor had faxed the note regarding his quarantine to Tyson, his old employer, instead of PSSI, his current employer. Rojas called PSSI. Someone at PSSI informed Rojas he was no longer employed with PSSI because he had not provided a doctor's note regarding his absences.

Rojas went through a review of his discharge. He explained over the phone what had happened and provided his doctor's notes. Someone at PSSI told him they would contact him about the situation, but no one contacted him.

After PSSI discharged Rojas, the Tyson plant at which Rojas worked for PSSI began testing employees for COVID-19. Over 700 employees tested positive for the virus.

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

For the reasons that follow, the administrative law judge concludes PSSI discharged Rojas from employment for no disqualifying reason.

Iowa Code section 96.5(2)(a), an individual is disqualified for benefits if the employer discharges the individual for misconduct in connection with the individual's employment.

Under Iowa Administrative Code rule 24.32(1)(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.

The Iowa Supreme Court has ruled this definition accurately reflects 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

This definition of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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(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.

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 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).

Excessive absences are not considered misconduct unless unexcused. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of

qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absence is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Here, the record shows that Rojas reported all of his absences. When he called into PSSI, he explained his health issues and the need to miss work.

The evidence establishes PSSI discharged Rojas for excessive unexcused absenteeism. All of Rojas's absences were caused by him quarantining for fourteen days because his doctor instructed him to do so due to the conclusion Rojas likely had COVID-19. Rojas was sick, more likely than not with a highly contagious and lethal respiratory virus that was spreading across the state and nation, and had to quarantine to help mitigate the spread to others. Thus, all of Rojas's absences are excused under the law. Rojas is therefore entitled to benefits because PSSI discharged him for a non-disqualifying reason.

**DECISION:**

The June 11, 2020 (reference 01) unemployment insurance decision is reversed. PSSI discharged Rojas from employment for no disqualifying reason. Benefits are allowed, provided Rojas is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



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Ben Humphrey  
Administrative Law Judge

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July 20, 2020  
Decision Dated and Mailed

bh/sam