

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRETT SIMMERMAN
Claimant

APPEAL NO: 09O-UI-15729-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 07-19-09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 12, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 23, 2009. The claimant participated in the hearing. Bill Brauer, Warehouse Manager and Chris Muhlbauer, Shift Supervisor, participated in the hearing on behalf of the employer. Employer's Exhibit One and Claimant's Exhibit A were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time heavy duty grocery order filler for Casey's Marketing Company from July 15, 2008 to April 10, 2009. The employer's attendance policy states that during the first year of employment two or more occurrences are considered excessive; if an employee exceeds five occurrences within 12 months he is subject to disciplinary action; and two no-call no-shows result in a self-termination (Employer's Exhibit One). The claimant was absent due to properly reported illness September 19, 2008; October 28, 29 and 31, 2008; December 12, 2008; February 17, 18 and 20, 2009; and March 6, 2009. He took a preapproved personal day November 21, 2008, to close on his house and a preapproved vacation day January 23, 2009 (Claimant's Exhibit A). The employer issued a written warning for excessive unscheduled absenteeism to the claimant January 24, 2009. The warning stated that if the claimant accrued another occurrence in the next 60 days he would be suspended or discharged. On March 7, 2009, Shift Supervisor Chris Muhlbauer told the claimant if he called in sick again he "didn't need to bother showing up again." The claimant was ill April 10 and 11, 2009, but did not call the employer either day or return to work because Mr. Muhlbauer effectively told him if he was sick again he would lose his job after his absence March 6, 2009. Mr. Muhlbauer testified he probably would not have remembered telling the claimant March 7, 2009, if he had one more absence he should not come back but does not deny he may have said that.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant did have nine unscheduled absences, those absences were due to properly reported illness and are not considered misconduct under Iowa law. The claimant was also absent due to illness April 10 and 11, 2009. He did not call the employer to report his illness or return to work because he believed Mr. Muhlbauer when he said if the claimant was absent again he did not need to return because his employment would be terminated. Although the claimant should have called in April 10 and 11, 2009, and checked with the employer to see if his employment was terminated, it was not unreasonable for him to rely on Mr. Muhlbauer's statement. All but two of the claimant's absences were due to illness, except for the one day of preapproved personal time and the one day of preapproved vacation time, but because the employer told him in March 2009 he would be discharged if he called in sick again he did not report his absences April 10 and 11, 2009. Consequently, the administrative law judge concludes the claimant's last two absences do not constitute disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The August 12, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs