

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY GLEASON
Claimant

TLH CLEANING LLC
Employer

APPEAL 22A-UI-07661-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/06/22
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, TLH Cleaning LLC, filed an appeal from the March 16, 2022, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion he was discharged, but not due to work-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 5, 2022. The claimant, Timothy Gleason, did not participate. The employer participated through Supervisor Jeanette Simmons and President Ted Hammes. Official notice was taken of the administrative file. Exhibit 1 was received into the record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether he is excused from repaying these funds due to the employer's non-participation at the factfinding stage?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked as a full-time rest area attendant for the employer from August 2018, until he separated from employment on January 21, 2022, when he was terminated. The claimant reported directly to Supervisor Jeanette Simmons. The employer cleans rest areas for the State of Iowa.

The employer has an employee manual which outlines its various policies. The attendance policy states that employees are to inform the employer that they will not be coming in for a shift at least four hours prior to the start of their shift. Employees also receive a Department of Transportation manual which outlines the cleaning standards it expects. Iowa DOT also requires employees to fill out a log after they clean the rest area.

The employer provided a litany of instances of misconduct / poor performance in the following categories: (1) sleeping on the clock in his vehicle, (2) bringing animals into the rest area, (3) bringing unrelated tools to work, (4) failing to fill out the DOT logbook, and (5) failing to sufficiently clean the rest area. The employer could not provide specific dates for these instances of misconduct.

The employer stated the claimant's attendance had been a problem in the past. The employer's witnesses testified that the claimant had attendance incidents on April 13, 2019, April 17, 2019, and April 19, 2019. The employer testified these incidents ranged between him being tardy between 15 minutes to an hour and a half in duration. They were unable to testify regarding any one incident. They were unable to provide any specific information regarding other attendance incidents.

On January 21, 2022, the claimant informed Ms. Simmons and Mr. Hammes ten minutes prior to the start of his shift on that day that he was not feeling well. He said he would not be coming into work that day. The claimant was terminated that same day.

When the administrative law judge asked Mr. Hammes and Ms. Simmons what led to his termination, they both replied that there were many different instances of misconduct that were considered which are generally listed in the third paragraph of the findings of fact. Exhibit 1 constitutes the employer's timeline of events. The administrative law judge notes the final incident as described on that document occurred on January 17, 2021. The final incident as described on that document makes no reference to the claimant reporting her was ill.

The following section describes the findings of facts necessary to resolve the overpayment issue:

As of the date of the hearing, the claimant has not received benefits. The parties were mailed a notice of factfinding on March 9, 2022, informing them of an interview on March 15, 2022 at 10:20 a.m.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct. The overpayment issue is moot because the claimant has not received benefits.

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), (7), and (8) 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.

(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.

(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.

Excessive absences are not considered misconduct unless unexcused. 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*, supra; *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. *Gaborit*, supra. 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* 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.

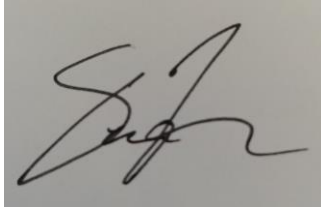
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The employer has the burden of showing the termination reason justifies disqualification from unemployment benefits. The employer terminated the claimant on January 21, 2022. The employer concedes the claimant informed them he was too ill to work that day prior to the start of his shift. The employer does not doubt that the claimant was in fact ill on that day. In that context, the final attendance incident cannot be considered misconduct under Iowa Admin. Code r. 871-24.32(7) (excluding from the definition of misconduct instances when the claimant informed the employer of an anticipated absence due to illness.) Since the employer cannot point to a current act of misconduct, the claimant is entitled to benefits, provided he is otherwise eligible. See Iowa Admin. Code r. 871-24.32 (8) (stating past acts are only relevant in determining the gravity of the final act leading to discharge.)

The employer could not provide specific instances of attendance or other infractions occurring in the past. Employers are required to provide a specific report outlining the reasons for discharge. Iowa Admin. Code r. 871-24.32 (4) (stating disqualifying misconduct requires specific descriptions of acts rather than conclusory information.) Benefits are granted, provided he is otherwise eligible.

DECISION:

The March 16, 2022, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged due to a non-disqualifying reason. The overpayment issue is moot because the claimant has not received benefits. Benefits are granted, provided he is otherwise eligible.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

June 27, 2022
Decision Dated and Mailed

smn/mh