

On August 21, 2014 the Claimant took an unauthorized break when he slept on the job. The foreman had to knock on the truck window to wake the Claimant. The Claimant asserts that he was drowsy on this day due to medication for a cold or flu.

On August 22, 2014 the Claimant was again tardy. He was tardy because of oversleeping. He arrived at 6:45 instead of 6:30. He had not called in. He was fired that day for his absenteeism and tardiness.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2014) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“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. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). Second the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 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 v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not “properly reported”. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982)(excused absences are those “with appropriate notice”). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused for reasonable grounds. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984); c.f. 871 IAC 24.23(4).

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 v. IDJS*, 350 N.W.2d 187, 190 (Iowa 1984).

As noted, the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts. In consonance with this, the law provides:

Past acts of misconduct. While past acts and warning 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.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W.2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). Specifically, “[h]abitual tardiness, particularly after warning that a termination of services may result if the practice continues, is grounds for one's disqualification.” *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984)(quoting *Spence v. Unemployment Compensation Board of Review*, 48 Pa.Cmwlth. 204, 409 A.2d 500 (1979)).

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final tardiness which caused the absence was unexcused. Again an absence can be unexcused because not for reasonable grounds or because not properly reported.

We turn first to the reason for the tardiness and absences. It does appear that some of the Claimant’s tardiness and absence is left unexplained. The court has found unexcused “personal problems or predicaments other than sickness or injury. Those include **oversleeping**, delays caused by tardy babysitters,

car trouble, and **no excuse.**” *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)(emphasis added). Based on the precedent, and common sense, at least in cases of tardiness a generic excuse - or none at all - is insufficient to constitute an excused reason. Meanwhile the *Higgins* case makes quite clear that delays caused by oversleeping are not excused. We see nothing that excuses oversleeping just because the employee did not intend to oversleep, or took precautions against oversleeping, or had some reason for oversleeping. This is nearly always the case. The reason for being late is sleeping too long, and the reason for sleeping too long doesn’t change this. Oversleeping is an unexcused tardiness. Thus the final tardy, which is either due to no reason established in the record or by oversleeping, is unexcused. Similarly the July 10, July 18, August 1, August 15, and August 18 absences are also not excused because of a lack of reasonable grounds. For today’s purposes we can consider the August 21 drowsiness excused as we do not know for how long the Claimant had drifted off, nor what he was supposed to be doing at the time.

Turning to proper reporting the record shows that the final tardy was not reported by 6:30. Thus it is unexcused both for lack of reasonable grounds, and for lack of proper reporting. When this occurs *either* basis is sufficient to find the absences unexcused. Similarly the Claimant failed to properly report the July 10 break, the July 18 late call, and the three no-call/no shows.

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the tardiness was excessive. The Claimant had at a minimum six unexcused absences or tardies in a six week period. This is excessive. In *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984) the record showed five absences and three instances of tardiness – the last two being for three minutes and one minute late - over eight months. *Infante* at 264, p. 267. This was “sufficient evidence of excessive unexcused absenteeism...to constitute misconduct.” *Infante* at 267. In *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007) the Court was faced with a claimant who had eight absences over an eight-month period. The claimant argued that of her eight absences most were excused under the law. The Court of Appeal found it unnecessary to address this argument, since three of the absences, over a period of eight months, were unexcused. “[W]e find the three absences constitute excessive unexcused absenteeism.” *Armel* slip op. at 5. Here the Petitioner’s history is similar to that in *Infante* and *Armel* – indeed his absences and tardies are at a rate greatly exceeding those in either case. The Claimant’s unexcused tardiness and absenteeism was excessive.

DECISION:

The administrative law judge’s decision dated October 6, 2014 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant’s weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)”a”.

A portion of the Employer’s appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (employment records) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today’s decision.

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

Kim D. Schmett

Ashley R. Koopmans

RRA/fnv