

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

WILLIAM G MALONE
Claimant

OMAHA STANDARD LLC
Employer

APPEAL 15A-UI-08318-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/21/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 14, 2015, (reference 01) unemployment insurance decision that denied benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 13, 2015. Claimant participated. Employer participated through human resources generalist Rachel Prucha and was represented by Michelle Hawkins of Talx. Employer's Exhibit 1 was received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a welder from January 20, 2005, and was separated from employment on June 24, 2015, when he was terminated.

Employer's attendance policy states that employees are terminated after accumulating eight points for unexcused absences and/or tardiness. Points for absences and tardiness expire after one calendar year from which they are assessed. Claimant was aware of the policy.

On April 2, 2015, employer informed claimant in writing that he had 7.5 attendance points. Claimant was informed that any additional time missed could result in termination. The points were assessed for unexcused absences and tardiness on the following dates:

June 17, 2014	.5 point
June 24, 2014	2 points
July 25, 2014	2 points
July 29, 2014	.5 point
August 12, 2014	.5 point
September 18, 2014	.5 point
September 24, 2014	.5 point
September 25, 2014	.5 point
September 30, 2014	.5 point

On June 9, 2015, claimant learned he had a court date on June 23, 2015, for a proceeding in which he was a defendant. Claimant asked a supervisory employee if he could take unpaid personal leave that day, as he had no remaining vacation time. The supervisor denied claimant's request. On the same day, claimant spoke with human resources generalist Rachel Prucha about the amount of attendance points he had accrued. After speaking with Prucha, claimant believed he would have enough available attendance points to attend his court date without being terminated.

On June 17, 2015, claimant's June 17, 2014, attendance point expired, leaving him with seven remaining attendance points. On June 23, 2015, claimant missed work for his court date and claimant was assessed two attendance points, giving him nine attendance points. On June 24, 2015, the two points issued to claimant on June 24, 2014, would have expired, leaving him with only seven attendance points. However, claimant was terminated on June 24, 2015, for accumulating nine attendance points the previous day.

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 § 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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). 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). The law limits disqualifying misconduct to

substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits.

Here, employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. While claimant had several absences or incidents of tardiness in 2014, he had no such incidents in 2015. On the date in question, June 23, 2015, claimant had not had an unexcused absence or tardiness in nine months. In other words, claimant's previous tardiness and absences were stale at that point and employer cannot establish claimant was excessively absent.

Moreover, claimant had no warning he would be terminated for attending his court date on June 23, 2015. Claimant had a conversation with Prucha which caused him to believe he had attendance points available to attend his court appointment. Prucha does not remember exactly what was said during this conversation, so claimant's recollection of the conversation is more credible.

Claimant was entitled to fair warning that he would be terminated for his absence on June 23, 2015. Without fair warning, he had no reasonable way of knowing he would be terminated for his failure to attend work on June 23, 2015. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. In this case, the document given to claimant in April 2015 was no longer current and had been superseded by his conversation with Prucha on June 9, 2015.

DECISION:

The July 14, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

cal/pjs