

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICK L MUNDY
Claimant

HY-VEE INC
Employer

APPEAL 19A-UI-01029-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/13/19
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 31, 2019, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephonic hearing was held on February 20, 2019. The claimant, Nick Mundy, participated. The employer, Hy-Vee, Inc., participated through Natalie McGee, Assistant Vice President of Human Resources; and Jamie Aulwes, Director of Grocery Warehouse. Employer's Exhibits 1 through 23 was received and admitted into the record without objection.

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, most recently as a warehouse worker, from August 30, 2003, until December 20, 2018, when he was discharged for excessive, unexcused absenteeism. Claimant's final absence occurred on December 2, 2018. Claimant was scheduled to work at 5:00 p.m. that evening. He called in at 5:00 p.m. to report that he was sick and could not come to work. Per the employer's instructions and prior written warnings, claimant was expected to bring in a doctor's note to excuse his absences. The employer asked for this note several times after claimant returned to work, and claimant responded that he forgot the note at home. On December 14, 2018, management told claimant that he was suspended until he brought in the doctor's note excusing his December 2 absence. Claimant was aware his job was in jeopardy, and he understood that he would lose his job if he could not provide a doctor's note excusing this absence.

Claimant had multiple prior absences. Claimant was absent on November 30, 2018. He called in sick that day, but he did not provide a doctor's note to excuse the absence. Claimant had multiple prior absences due to illness, and at the time of his discharge claimant had exhausted his available FMLA leave. Claimant was a no-call/no-show on November 7, September 7,

August 31, August 24, and June 15, 2018. Claimant received multiple warnings related to his attendance during his employment. Most recently, claimant received a final warning on October 12, 2018. In this warning, claimant was instructed that he must provide a doctor's note immediately upon his return to work after an unplanned absence due to illness. (Exhibit 4) Prior to this final warning, claimant received a written warning on December 26, 2017; a written warning on March 26, 2018; a written warning on April 3, 2018; a warning letter on July 6, 2018; a three-day suspension on May 8, 2018; and a five-day suspension on September 4, 2018. (Exhibits 5 through 12)

The employer maintains a set of Attendance Guidelines for employees to follow. (Exhibits 19 through 21) This is a points-based attendance policy. The employer assesses one attendance point to an employee for each unplanned absence. Unplanned absences include absences due to illness but exclude absences protected by qualified FMLA/medical leave. (Exhibit 19)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to disqualifying, job-related misconduct. Benefits are withheld.

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.

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 "[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. 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). When no excuse is given for an absence at the time of the absence and no reason is given in the record, an absence is deemed unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984). See also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. In this case, claimant failed to provide a doctor’s note to excuse his December 2 absence. He did not report to the employer that he was not able to get a doctor’s note for an excusable reason. Instead, he continued telling the employer he forgot his note at home, and then he failed to provide a note entirely. Claimant had been explicitly told that he was required to provide a doctor’s note, due to his excessive absences. Claimant’s absence history shows numerous absences due to illness as well as multiple no-call/no-show absences, which are never excused. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The January 31, 2019, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn