

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTOPHER DEESE

Claimant

APPEAL 16A-UI-06223-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PET PRODUCTS INC

Employer

OC: 05/08/16

Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 27, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 3, 2016. Claimant participated. Clarianne Young participated on claimant's behalf. Sajeera Walton did not answer when contacted at the number provided and did not attend the hearing. Mello registered for the hearing, but claimant did not want Mello contacted and Mello was not contacted. Employer participated through human resources clerk Dakota Cunningham.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a general laborer/oven assistant from April 10, 2014, and was separated from employment on May 4, 2016, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated, and will be subject to discharge upon receiving fourteen points. Points are removed after one calendar year. Claimant was aware of the employer's policy.

The final incidents occurred when claimant was absent for his scheduled shifts on April 29, 2016, May 2, 2016, May 3, 2016, and May 4, 2016. On April 29, 2016, claimant's mother (Ms. Young) called the employer and reported that claimant was in jail. Claimant was a no-call/no-show on May 2, 3, and 4, 2016. Claimant received three points for each day he was absent. Claimant's absence on May 4, 2016 gave him a total of thirty-two points.

The employer has a computer system that records if claimant was clocked in. The computer system did not show any hours worked for claimant on April 29, 2016, May 2, 2016, May 3, 2016, and May 4, 2016.

Claimant testified he was in jail on April 29, 2016 because he had been caught driving while barred. Claimant did not know his license was barred, but testified he was aware his license had been suspended.

Claimant was last warned on April 13, 2016, that he faced termination from employment upon another incident of unexcused absenteeism when he signed a last chance agreement. Claimant was warned to not have any further absences. Claimant was at twenty points when he signed the last chance agreement. Claimant was also issued warnings for his attendance infractions on March 31, 2016, February 16, 2016, January 21, 2016, and March 25, 2015.

REASONING AND CONCLUSIONS OF LAW:

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

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(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.

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). In the context of disqualification for unemployment benefits based on misconduct, the question is whether the employee engaged in a "deliberate act or omission," conduct "evinced 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 conduct with "carelessness or negligence of such degree of recurrence as to manifest equal culpability." See Iowa Admin. Code r. 871 – 24.32(1)(a). Further, 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. See Iowa Admin. Code r. 871 – 24.32(7). However, excessive absences are not considered misconduct unless unexcused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). For example, 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); *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). 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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, 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. Prior to April 13, 2016, claimant had multiple warnings regarding his attendance infractions. On April 13, 2016, claimant had twenty attendance points and he entered into a last chance agreement with the employer. Claimant was warned that another unexcused absence would result in discharge. On April 29, 2016, claimant was scheduled to work, but he did not work. Ms. Young contacted the employer and reported that claimant was in jail. Claimant had been arrested for driving while barred. Claimant testified he knew he was driving without a valid license (claimant believed his license was suspended). Claimant knowingly drove without a valid license, which resulted in his incarceration and missing work on April 29, 2016. The parties presented conflicting testimony as to whether claimant was absent on May 2, 3, and 4, 2016. Claimant testified that he worked all three days and Ms. Young testified that she took

claimant to work on May 4, 2016. However, Mr. Cunningham presented credible testimony that claimant was absent from work on May 2, 3, and 4, 2016. Mr. Cunningham testified that the employer uses a computer system that reports the hours worked and claimant did not have any reported hours worked for May 2, 3, and 4, 2016.

Even if claimant was found to have worked on May 2, 3, and 4, 2016, the employer still established that the claimant was warned that further unexcused absences could result in termination of employment on April 13, 2016 and claimant had a final absence on April 29, 2016 that is not considered excused. Claimant was arrested for driving while barred and he was unable to work on April 29, 2016 because he was incarcerated. There was evidence presented that claimant had engaged in the activities that led to his arrest. Claimant admitted he knowingly was driving without a valid license. This evidence was credible because it came from claimant. Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)). Claimant became ineligible for work on April 29, 2016 due to his incarceration. Because claimant admitted to the conduct that led to his incarceration (knowingly driving without a valid license) and therefore engaged in the behavior that led to his incarceration the resulting absence due to claimant's failure to comply with state law are volitional and constitute misconduct. The final absence, in combination with claimant's history of absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The May 27, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs