

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BLANE KITZMAN
Claimant

JELD-WEN INC
Employer

APPEAL 17A-UI-08910-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 08/06/17
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 August 25, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 19, 2017. The claimant participated personally. The employer participated through Sharon Miller, plant administrator. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a 9/90 operator and was separated from employment on August 10, 2017, when he was discharged for continued unexcused absenteeism.

The employer has an attendance policy which designates point values to attendance infractions, including absences, leaving early and tardies. Upon receipt of six points in a rolling twelve month period, an employee is subject to discharge. The claimant was made aware of the policy and issued written warnings on April 6, 2017, May 8, 2017 and July 10, 2017.

The claimant incurred points for the following absences:

January 3, 2017	Late	Unknown reason
April 4, 2017	Absent	Unknown reason
April 8, 2017	Absent	Illness
May 3, 2017	Left early (1/2 day)	Unknown reason
June 14, 2017	Unexcused absence of 3 hours	Unknown reason
July 3, 2017	Absent	Took vacation after time off request was denied
July 19, 2017	Left early (3 hours)	Mental fatigue due to staffing
July 31, 2017	Left early (3 hours)	"To prove a point"; claimant was frustrated with staffing
August 2, 2017	Left early (3 hours)	Claimant was "sick of doing two peoples' job for the price of one"

Prior to discharge, the claimant did not make human resources aware of any concerns related to "abuse" or mental fatigue from having to cover for absent staff. The employer acknowledged employees were sometimes impacted by staff shortages but were continuously trying to hire and fill positions. The claimant was subsequently discharged on August 10, 2017, for his August 2, 2017 absence, attributed to leaving early because he was frustrated and sick of doing two peoples' job for the price of one."

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.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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). (Emphasis added).

In the specific context of absenteeism the administrative code provides:

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.

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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The administrative law judge is persuaded the claimant was aware of the employer's policies which allocated point values for attendance infractions and that upon receipt of six points, he could be discharged. The claimant received three written warnings (April 6, May 8 and July 10, 2017) to notify him of his points and that his job was in jeopardy. The claimant had one absence related to illness, on April 8, 2017, which would be considered excused in determining his eligibility for unemployment benefits. The claimant had four absences for unknown reasons on January 3, April 4, May 3, and June 14, 2017. Those absences would be considered unexcused. The claimant's absence on July 3, 2017 when he was denied vacation but took it anyway, would be considered unexcused.

The claimant's final three absences on July 19 and 31, and August 2, 2017 when he left early because he was frustrated with the staffing, "wanted to prove a point" and "tired of doing two peoples' jobs" would be considered unexcused as well, based on the reasons for the absences. The administrative law judge recognizes the claimant's frustration at times when the employer was short staffed, but an employer has the right to allocate personnel in accordance with the

needs and available resources. *Brandl v. Iowa Dep't of Job Serv.*, (No. ___-___/___-___, Iowa Ct. App. filed ___, 1986). The evidence presented is the employer was trying to backfill positions and not increase strain on employees. It is further established that in the workforce, if an employee is absent, his or her co-workers may have to temporarily absorb the work. Similarly, if that employee is absent, their co-workers may pick up the work for the day. The claimant's attempt to "prove a point" by repeatedly leaving early only further created a decrease in staffing and was contrary to the best interests of the employer. Based on the evidence presented, the administrative law judge concludes the claimant had one excused absence and eight unexcused absences.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007). In this case, the claimant had eight unexcused absences. This is clearly excessive. Based on the evidence presented, the employer has credibly established that the claimant was warned that further 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 August 25, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn