

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

BRANDT M ROBINSON
Claimant

APPEAL NO. 18A-UI-05599-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE AMERICAN BOTTLING COMPANY
Employer

OC: 04/15/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Brandt Robinson (claimant) appealed a representative's May 7, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with The American Bottling Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 14, 2018. The claimant was represented by Justin Swaim, Attorney at Law, and participated personally. The employer participated by Stephanie Dixon, Associate Human Resources Manager, and Patrick Long, Maintenance Manager. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 21, 2015, as a full-time maintenance mechanic. The claimant signed for receipt of the employer's handbook and attendance policy on July 21, 2015. The employer's policy states that an employee will be terminated if he accumulates six attendance points in a twelve-month rolling period. Employees are also allowed unpaid days off that they may request twenty-four hours in advance. The claimant knew the employer allowed his co-worker to use his unpaid days on two occasions without twenty-four hour notice.

The claimant properly reported his absences in his last year of employment. He was absent on May 4, 2017, when his two-year-old child had surgery. He was absent for personal reasons on May 31 and December 5, 2017. On January 18, 2018, the claimant was sick and provided the employer with a doctor's note. The employer assessed the claimant one point for each absence. The employer issued the claimant written warnings on or about June 1, 2017, and January 24, 2018. The employer notified the claimant that further infractions could result in termination from employment.

On January 28, 2018, the claimant's supervisor thought the claimant was too sick to work and sent him home. The employer assessed the claimant an attendance point. On January 29, 2018, the claimant was absent due to illness. He provided the employer with a doctor's note for the two days. The employer assessed the claimant one point for the two consecutive days of illness. The claimant had a total of five attendance points. The employer issued the claimant a written warning on or about January 30, 2018. The employer notified the claimant that further infractions would result in termination from employment.

On April 13, 2018, the claimant properly reported his absence because he was incarcerated. He requested to use one of the many unpaid days he had available to him. The employer said it would consider his request. On April 15 and 16, 2018, the claimant returned to work. On each day the employer said it was considering the claimant's request to use an unpaid day off for his absence on April 13, 2018. On April 17, 2018, the employer denied the claimant's request of the unpaid day, assessed him 1.5 attendance points for his absence on an overtime shift, and terminated him for accumulating 6.5 attendance points.

The claimant found seasonal work in May 2018, and is currently working for C & C Fencing. His criminal case is pending.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for 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(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 of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

The incidents of absence in January 2018, were for properly reported illness. These absences do not amount to job misconduct because they were properly reported. The claimant's absence

when his toddler had surgery also cannot be considered misconduct. A parent's presence with their child for surgery has no wrongful intent.

Therefore, the employer terminated the claimant for his absences on May 31, 2017, December 5, 2017, and April 13, 2018. The claimant reported to the employer that he would not be at work on the two occasions in 2017. The employer did not inquire with the claimant as to the reason for his absence. The claimant might have been ill. The employer did not provide evidence that it knew a reason for the claimant's incarceration on April 13, 2018. The wrong person could have been arrested.

While it is true that an employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work, it is also true that the employer should gather that information for determination regarding whether the absences are excused. If an employer chooses to institute a no fault attendance policy, the employer incurs potential liability for unemployment insurance benefits related to the separation. The employer has the burden of proof to show misconduct. Without inquiry, the employer has not provided sufficient evidence that the claimant's absences were unexcused. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's May 7, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs