

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN LEWIS

Claimant

APPEAL 17A-UI-05029-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM ONSITE SERVICES MIDWEST INC

Employer

OC: 04/16/17

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 2, 2017 (reference 01) unemployment insurance decision that found claimant was not eligible for unemployment insurance benefits because he was discharged from work for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on May 31, 2017. The claimant, John Lewis, participated personally and was represented by Attorney Samuel J. Aden. The employer, ABM Onsite Services Midwest Inc., was represented by Attorney Katrina Raisch and participated through witnesses Brooke Hupke, Christine Wetzler, and Jackie Sciorrotta. Claimant's Exhibit 1 was admitted. Employer's Exhibits A – F were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits file including the fact-finding documents.

ISSUES:

Was the claimant discharged for job-related misconduct?

Did the claimant voluntarily quit his employment with good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed from June 26, 2014 until March 1, 2017. Claimant was employed as a utility man. His job duties included stocking supplies and scrubbing floors. Brooke Hupke was his immediate supervisor. Claimant's working hours were 7:30 a.m. to 4:00 p.m. Monday through Friday each week.

On or about December 20, 2016 claimant suffered a work-related injury. He eventually had surgery on January 3, 2017. He was instructed by his treating physician to refrain from working until February 15, 2017. When he returned to work, he was given working restrictions from his physician. Those work restrictions included light duty work only and no lifting more than 10-15 pounds. These working restrictions were in place until March 1, 2017.

The employer has a written attendance policy. See Exhibit D. Claimant agreed to adhere to the attendance policy. See Exhibit D. The policy required that he must call his supervisor at least four hours prior to his scheduled shift start time if he was unable to report to work. See Exhibit D. Employer's work rules state that excessive tardiness or absenteeism is cause for termination. See Exhibit F. On December 23, 2016 claimant signed a document entitled "Employee's Responsibilities for Work Related Injuries/Illness". See Exhibit B. This document states: "It is YOUR responsibility to keep in contact with your supervisor." See Exhibit B. Claimant also signed and acknowledged that he understood the employer's work rules. See Exhibit F. The work rules state that some situations may not be subject to progressive disciplinary steps and that under certain circumstances, an action may be serious enough to constitute misconduct, resulting in immediate termination. See Exhibit F. The work rules go on to state that failure to report that you will be absent is cause for termination. See Exhibit F.

Claimant's last day physically worked on the job was February 17, 2017. He was scheduled to work on February 20, 2017 but was absent from work the entire day. Claimant did call and report his absence on February 20, 2017 at 7:26 a.m. and he was unable to work on this date due to illness. See Exhibit C.

Claimant was scheduled to work on February 21, 2017 but he did not work due to illness. He reported his absence to his supervisor at 4:58 a.m. on February 21, 2017. See Exhibit C.

Claimant was scheduled to work on February 22, 2017 but he did not work due to illness. Claimant spoke to Ms. Hupke at approximately 7:34 a.m. on this date to report his absence from work. See Exhibit C.

Claimant was scheduled to work on February 23, 2017 but he did not work due to illness. Claimant telephoned Ms. Hupke to report his absence from work due to illness at 7:04 a.m.

Claimant was absent from work on February 24, 2017 due to illness and did not report his absence from work on this date. Claimant was absent from work on February 27, 2017 due to illness and did not report his absence on this date. Claimant was absent from work on February 28, 2017 due to illness and did not report his absence from work on this date. Claimant was absent from work on March 1, 2017 due to illness and did not report his absence from work on this date. Claimant was discharged from work on March 1, 2017 due to absenteeism and failure to notify his employer of his absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Claimant did not voluntarily quit. Claimant was discharged from employment for 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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was **not "properly reported."** *Higgins*, 350 N.W.2d at 191 (Iowa 1984)(emphasis added) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

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. See *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).

In this case, the claimant had received work rules notifying him that excessive absenteeism and failure to notify his supervisor of absences may lead to discharge. The claimant knew that he needed to come to work on time. He understood the attendance policy and knew that he needed to report any absences at least four hours prior to his scheduled shift start times.

In this case, claimant had eight unexcused absences in less than one month. These unexcused absences occurred on February 20, 21, 22, 23, 24, 27, 28, of 2017 and March 1, 2017. While these absences were due to illness, claimant did not properly report his absences at least four

hours prior to his work shift beginning. Eight unexcused absences in less than one month are excessive.

The employer has established that the claimant's excessive absenteeism and his failure to notify his supervisor of his absences amount to job-related misconduct. Claimant knew that he could be discharged for excessive absenteeism and failing to notify his supervisor of his absences according to the work rules that he was given. Benefits are denied.

DECISION:

The May 2, 2017 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as he is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn