

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VERNON D LAWSON
Claimant

ADVANCE SERVICES INC
Employer

APPEAL 22A-UI-04027-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/09/22
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, Vernon D Lawson, filed an appeal from the January 27, 2022, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged due to excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on April 26, 2022. The claimant participated. The employer participated through Risk Manager Melissa Lewien. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 were received into the record. Official notice was taken of the agency records.

ISSUE:

Whether the claimant's discharge was due to disqualifying conduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time in a variety of roles from February 20, 2020, until this employment ended on December 16, 2021, when he was terminated. The claimant began his last assignment at the site employer, Many Hands. He was a stock clerk in that assignment. His immediate supervisor was Store Manager Carmen Brown.

The employer has a list of work rules. It provided a copy of the work rules it gives to its employees. The work rules state the following, "If I commit any of the above work rule violations, I understand disciplinary action will be taken up to and including termination." It lists "no-call / no-show to an assignment" and "violating the attendance policy, without good cause" as work rule violations. The employer provided a copy of the list of work rules. (Exhibit 2) The claimant acknowledged receipt of the work rules list and other items in the orientation packet on January 28, 2020. The employer provided a copy of the claimant's acknowledgement. (Exhibit 3)

From August through November 2021, the claimant's work schedule was from 11:00 a.m. through 6:00 p.m. Tuesdays through Saturdays. After November 2021, the claimant's work schedule was from 10:00 a.m. to 6:00 p.m. Tuesdays through Saturdays.

On June 2, 2021, the claimant received a written warning from the employer regarding his attendance. The written warning said the claimant was a no-call/no-show on May 25, 2021, May 28, 2021, and June 2, 2021. It explained that the claimant arrived to work at 11:30 on June 2, 2021, after being told to come in. It also warned, "If you engage in similar behavior again, you could be subject to further disciplinary action up to and including the termination of your employment." The employer provided a copy of the written warning. (Exhibit 10)

On November 13, 2021, the claimant did not arrive to work at his scheduled start time. The claimant told Alexis Zalabowski at 9:05 a.m. on November 15, 2021, that he overslept due to switching his medication. The employer provided a contemporaneous log of this conversation. (Exhibit 6)

On November 15, 2021, the employer issued a written warning to the claimant regarding to the no-call / no-show that occurred on November 13, 2021. The written warning emphasized the claimant was to inform the site employer and the employer of an anticipated absence before the start of his shift. It also warned, "If you engage in similar behavior again, you could be subject to further disciplinary action up to and including the termination of your employment." The employer provided a copy of the written warning. (Exhibit 1)

On December 6, 2021, the claimant noticed his vehicle was leaking brake fluid. The claimant filled up his brake fluid reservoir which was dry.

On December 7, 2021, the claimant called in at 8:45 a.m. informing Ms. Zalabowski because he could not commute to work because his brakes were not operating, and the roads were slick. The employer provided a copy of the written warning. (Exhibit 7)

On December 10, 2021, the claimant called in informing Ms. Howerton at 1:15 p.m. he could not commute to work because his brakes were not operating, and the roads were slick. The employer provided a copy of the written warning. (Exhibit 8)

On December 11, 2021, the claimant called in at 1:09 p.m. and left a voicemail informing the employer he could not commute to work because his brakes were not operating, and the roads were slick. The employer provided a copy of the written warning. (Exhibit 9)

On December 16, 2021, the claimant called in at 3:00 p.m. and spoke with Jessica Howerton informing her that he could not commute to work because his brakes were not operating, and the roads were slick. The employer provided a contemporaneous log of this conversation. (Exhibit 4) At 3:20 p.m., Ms. Howerton called the claimant back and informed him that the employer was ending his assignment because his attendance was poor. Ms. Howerton explained that the employer found the claimant's attendance incidents on December 7, 2021, December 10, 2021, December 11, 2021, and December 16, 2021 as excessive because they all occurred in a months' time. The claimant replied, "I cannot drive without brakes." Ms. Howerton reminded the claimant that he assured the employer he was going to get them fixed, but he had not done so. The claimant said he had been trying but everywhere was booked. Ms. Howerton repeated that the employer would be terminating his employment. The employer provided a contemporaneous log of this conversation. (Exhibit 5)

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 § 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.

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-

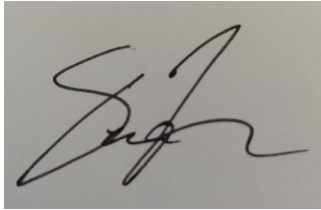
24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. Excessive unexcused absenteeism is an intentional disregard of the duty 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 "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* 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. 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).

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. The employer has established that the claimant was warned that further improperly reported unexcused absences could result in termination of employment and the final absence was not properly reported excused. The claimant contends the vehicle related absences should be excused, but this is not a category that is excused. See *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984). The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The January 27, 2022, (reference 01) unemployment insurance decision is affirmed. The 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.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is shown within a rectangular frame.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

May 16, 2022
Decision Dated and Mailed

smn/scn