

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN D TAYLOR
Claimant

SHEARERS FOODS BURLINGTON LLC
Employer

APPEAL 16A-UI-13046-JP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/13/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 2, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 28, 2016. Claimant participated. Employer did not participate; the employer did not answer when contacted at the number provided.

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: Claimant was employed full-time as a mixer from February 2015, and was separated from employment on November 6, 2016, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving eight points. Claimant was aware of the employer's policy.

The final incident occurred when claimant was sent home early from his scheduled shift on November 6, 2016. Claimant works from 10:00 p.m. to 6:00 a.m. Prior to going to work on November 5, 2016, claimant consumed alcohol at a celebration party, but left the party to go to work around 9:30 p.m. Around 2:00 a.m. on November 6, 2016, the employer approached claimant about an odor of alcohol. Claimant admitted to consuming alcohol prior to his shift. The employer transported claimant to the hospital for an alcohol breath test. A doctor gave claimant a breath test at the hospital. Claimant's test gave a result of 0.14. Claimant was notified about the results of the test at the hospital. Claimant was not offered a second test to confirm the results. Claimant did not believe he was intoxicated at work and was able to perform his job duties. The employer brought claimant back to work and sent him home because he still had alcohol in his system. The employer did not offer claimant any rehabilitative services. Prior to November 5, 2016, claimant had seven attendance points, but because he was sent home early on November 6, 2016, the employer gave him one point, which put him at eight total points. Claimant was then contacted by the employer on November 6, 2016 and told he was discharged due to absenteeism.

Claimant had prior warnings for absenteeism. Claimant's most recent warning was around September 2016 and he was warned that he faced discharged from employment upon another incident of unexcused absenteeism. Claimant testified most of his attendance infractions were due to illness and he properly reported his absences.

The employer has a drug and alcohol policy that prohibits drug and alcohol use. Claimant testified he is not aware of the employer's policy establishing a standard for alcohol concentration that will be deemed to violate the policy. The employer has over fifty employees. Claimant had worked for the employer at least twelve of the prior eighteen months.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*.

Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. 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.*, 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. *Gaborit, supra*. 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). 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 v. Emp’t Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Although claimant’s final incident of absenteeism is not considered excused, a majority of his prior absences were due to illness, which he properly reported and are considered excused. One unexcused absence is not disqualifying since it does not meet the excessiveness standard. Furthermore, the evidence presented indicated claimant was merely sent home on November 6, 2016 due to his having alcohol in his system. No evidence was present that claimant was discharged for violating the employer’s drug and alcohol policy. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

DECISION:

The December 2, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs