

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

TERRENCE T JACKSON
Claimant

CNH AMERICA LLC
Employer

APPEAL 23A-UI-02673-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/12/23
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge from Employment

STATEMENT OF THE CASE:

On March 13, 2023, employer CNH America LLC filed an appeal from the March 2, 2023 (reference 01) unemployment insurance decision that allowed benefits based on a determination that claimant was discharged on February 10, 2023, for absenteeism and his absences were both excused and properly reported. The parties were properly notified of the hearing. A telephonic hearing was held at 11:00 a.m. on Wednesday, March 29, 2023. Claimant Terrence T. Jackson did not appear for the hearing. Employer CNH America LLC participated through Savannah Pulse, Human Resource Specialist. Employer's Exhibits 1 through 21 were received and admitted into the record. The administrative law judge took official notice of the administrative record to assist in determining whether the employer participated in the fact-finding interview.

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 began working for this employer on November 3, 2014. Most recently, he worked full-time hours as an assembler, beginning at 6:30 a.m. each day. Claimant's employment ended on February 14, 2023, when the employer discharged him for violating the attendance policy.

Claimant's final absence occurred on February 8, 2023. He called in and reported that he would be using his "9-1-1 emergency" day. The employer gives its employees one of these emergency days each June; they have to use it as a last-minute absence and are not able to use the emergency day to cover a pre-planned absence such as a vacation day. Normally, use of the emergency day does not count against an employee. However, claimant had already accrued seven total attendance points, so he was not permitted to use the emergency day without penalty.

Prior to February 8, claimant's most recent absence occurred on November 23, 2021, when he called in due to personal illness. Claimant had incurred four unexcused absences in August

2021. Two of the August 2021 absences were full-day absences for “personal” (non-illness) reasons that claimant reported with insufficient notice. The employer requires absence to be reported at least thirty minutes prior to the start of the scheduled shift, and claimant reported these absences sometime after thirty minutes prior to the shift. The other two August 2021 absences were late arrivals to work. On one occasion, claimant was two minutes late to work. On the other occasion, claimant was three minutes late to work. Claimant did contact the employer prior to either of these late arrivals at least thirty minutes prior to the start of his shift to alert the company that he would be late.

Claimant received multiple Attendance Discipline Reports during his employment. Most recently, the employer issued claimant an Attendance Discipline Report on September 9, 2021, after his August unexcused absences. (Exhibit 16) In accordance with this disciplinary action, claimant was given a five-day (forty-hour) suspension. (Exhibit 17) According to the discipline guidelines on the Attendance Discipline Report, the employer will issue a verbal warning; then a written warning; then a final written warning; then a four-day or five-day suspension; then a termination. (Exhibit 16)

The employer submitted historical Attendance Discipline Reports dating back to January 28, 2016, the date of claimant’s documented verbal warning for absenteeism. (Exhibit 1). The employer did not submit a copy of the employer’s attendance policy, beyond the recitation of points levels and consequences stated on the disciplinary documents. In an email to Pulse and another employee regarding claimant’s discharge, PD Training Specialist Kimberly Wittkamp states, “I called [claimant], put him on speaker, and explained that we were terminating him due to attendance[.] He claimed he did not know he could not use his 911 because his points were too high...”

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,371.00, since filing a claim with an effective date of February 12, 2023, for the three weeks ending March 4, 2023. The administrative record also establishes that the employer did not participate in the fact-finding interview or provide written documentation that, without rebuttal, would have resulted in disqualification. The fact-finder appears to have reached someone named “Erica,” who told them to use the information the employer provided in SIDES. The administrative law judge reviewed the SIDES system, and the employer’s response was minimal and had no attachment submitted.

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, provided claimant is otherwise eligible.

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

Iowa Code section 96.5(2)(a) and (d)(9) provide:

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 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.

...

d. For the purposes of this subsection, “*misconduct*” means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee’s contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(9) Excessive unexcused tardiness or absenteeism.

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).

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 employer must prove two elements to establish misconduct based on absenteeism. 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 v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d 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. Iowa Admin.

Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When a claimant does not provide an excuse for an absence, the absence is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

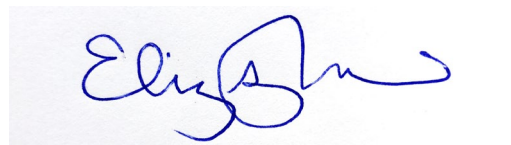
Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing work three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 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, claimant's final absence was a "911 emergency" absence for an unreported reason. This absence must be considered unexcused. Claimant did not have any other unexcused absences within one year of this absence, even taking into account the period of time when he was not working due to the strike. Claimant's sole absence within that one-year period was an absence due to illness that he properly reported to the employer. The employer has not established claimant was discharged due to excessive and unexcused absenteeism. Benefits are allowed.

As benefits are allowed based on this separation, the issues of overpayment and chargeability are moot.

DECISION:

The March 2, 2023 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment and chargeability are moot.



Elizabeth A. Johnson
Administrative Law Judge

April 03, 2023
Decision Dated and Mailed

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.