

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHAUN M JOHNSON
Claimant

NEW COOPERATIVE INC
Employer

APPEAL 18A-UI-11310-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/21/18
Claimant: Appellant (1)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Shaun Johnson, Claimant, filed an appeal from the November 9, 2018 (reference 01) unemployment insurance decision that denied benefits because he was discharged from work with New Cooperative, Inc. due to excessive unexcused absenteeism after being warned. The parties were properly notified of the hearing. A telephone hearing was held on December 12, 2018 at 1:00 p.m. Claimant participated. Employer participated through Justin Reuter, Human Resources Coordinator; Craig Harris, Location Manager; and Brandon Albers, Operation Lead. Employer was represented by attorney Stuart Cochrane. Employer's Exhibits 1 – 3 were admitted.

ISSUE:

Whether claimant's separation was a discharge due to 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 location operations worker from April 9, 2018 until his employment with New Cooperative, Inc. ended on October 24, 2018. (Reuter Testimony) Claimant's direct supervisor was Brandon Albers. (Reuter Testimony) Claimant's schedule was Monday through Friday from 7:00 a.m. until 4:30 p.m. (Reuter Testimony)

Employer's attendance policy requires employees to notify their supervisors prior to their starting time if they will not be at work. (Exhibit 1) The attendance policy provides that absence from work without notification and extreme tardiness is grounds for discipline or dismissal. (Exhibit 1) The policy is included in employer's handbook, to which claimant had access. (Reuter Testimony)

On August 27, 2018, claimant was absent from work and did not provide employer with notice prior to the start of his shift; the reason for claimant's absence was a personal matter. (Reuter Testimony) On August 28, 2018, claimant was absent from work and did not provide employer with notice of his absence. (Harris Testimony) On August 29, 2018, claimant was absent from work and did not notify employer prior to the beginning of his shift. (Harris Testimony)

On September 27, 2018, claimant was absent from work and did not provide employer with notice prior to the start of his shift; the reason for claimant's absence was lack of transportation. (Reuter Testimony) On September 28, 2018, claimant was absent from work and provided employer with notice prior to the start of his shift; the reason for his absence was lack of childcare. (Reuter Testimony)

On October 11, 2018, claimant was absent from work and did not provide notice to employer before the start of his shift; the reason for claimant's absence was transportation-related. (Reuter Testimony) On October 12, 2018, claimant was absent from work and provided employer with notice prior to the start of his shift; the reason for claimant absence was his child's illness. (Reuter Testimony) On October 15, 2018, claimant did not report to work and notified employer prior to the start of his shift; the reason for claimant's absence was his child's hospitalization. (Reuter Testimony) On October 20, 2018, claimant did not report to work and did not report his absence prior to the start of his shift; the reason for his absence was his child's illness. (Reuter Testimony) On October 22, 2018, claimant did not report to work and did not provide notice prior to the start of his shift; the reason for claimant's absence was illness. (Reuter Testimony) On October 23, 2018, claimant was absent from work and did not provide notice prior to the start of his shift; the reason for claimant's absence was family issues. (Reuter Testimony)

On August 23, 2018, employer gave claimant a final written warning regarding his absenteeism. (Exhibit 2) The warning reiterates the attendance policy by stating that claimant is to call or text employer before working hours start if he will not make it in to work. (Exhibit 2) The warning states that failure to comply with company policies will result in termination. (Exhibit 2) The warning also states in bold font that "satisfactory improvement must be shown and maintained or further disciplinary action (up to and including termination) will be taken. (Exhibit 2) On October 16, 2018, employer verbally warned claimant that further violations of the attendance policy may result in his termination; employer told claimant that it was his last warning. (Reuter Testimony) On October 24, 2018, employer terminated claimant's employment due to violation of the employer's attendance policy. (Reuter Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

Iowa Code section 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 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(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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(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.

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, 11 (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).

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 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 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). 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. In light of good faith effort, absences due to inability to obtain child care for sick infant, although excessive, did not constitute misconduct. *McCourtney v. Imprimis Technology, Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). Distinguish from *Harlan* if the absence is due to the illness of an infant or small child.

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.*, 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).

Claimant was required to provide employer with notice of his absence prior to the beginning of his shift per the employer's policy and his prior written warning. Claimant was absent eight times without giving notice to his employer prior to the start of his shift. An absence that is not properly reported is unexcused, regardless of the reason for the absence. Claimant was absent three times with proper notice to employer. The absence on September 28, 2018 was due to lack of childcare, which is a matter of personal responsibility; therefore, the absence is unexcused. The absences on October 12th and 15th were due to his child's illness, which is a reasonable ground for an absence; thus, the absences are excused.

Claimant worked for employer for less than seven months. During claimant's last two months of employment, he accrued two excused absences and nine unexcused absences. Claimant's unexcused absenteeism was excessive. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The November 9, 2018 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs