

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

LESTER SANCHEZ CABADA
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 21A-UI-20487-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/04/21
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

On September 13, 2021, Lester Sanchez Cabada (claimant/appellant) filed an appeal from the September 8, 2021, reference 02, unemployment insurance decision that denied benefits based upon the conclusion he was terminated due to excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on November 4, 2021. The claimant participated. The claimant was represented by Mary Hamilton, attorney at law. The employer did not participate.

ISSUE:

Whether the claimant's separation from employment was disqualifying?

FINDINGS OF FACT:

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

The claimant was employed full-time as a foley operator from October 10, 2016, until this employment ended on June 6, 2021, when he was discharged. The claimant's schedule ran from 7:00 a.m. to 3:00 p.m. Monday through Saturday.

The employer has an attendance policy. The attendance policy states that each time an employee has an unscheduled absence or tardy for any reason, then they are assessed one attendance point. The employee is to be terminated after accruing nine points.

On June 6, 2021, the claimant was informed by his supervisor Freddy (last name unknown) and a Human Resources Generalist (name unknown) that he was being terminated for being excessively tardy. The claimant had been tardy for the last time earlier that week. He could not say how many times he had been tardy. However, the claimant stated that there were months of time separating each tardy occurrence. The claimant called in prior to each tardy to inform management that he was late because he had to take his wife to doctor's appointments to treat her post-partum depression.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer has failed to meet its burden to show the claimant engaged in work-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(4) and (7) 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.

(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.**

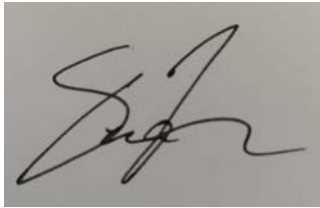
Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for 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).

It is the employer's burden to give detailed facts regarding the misconduct leading to the claimant's separation. The employer did not participate in this hearing. The claimant offered that he had been tardy before an unspecified amount of times and those occurrences were months separated from one another. Without more specific information, it is impossible to determine whether the claimant was in fact excessively absent. The employer has failed to meet its burden. Benefits are granted.

DECISION:

The September 8, 2021, reference 02 unemployment insurance decision is reversed. The claimant was discharged for non-disqualifying misconduct. Benefits are granted, provided he is otherwise eligible.

A handwritten signature in black ink on a light gray background. The signature is stylized and appears to read 'S. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Des Moines, Iowa 50319-0209
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December 10, 2021
Decision Dated and Mailed

smn/scn