

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRAVIS WHITCHER
Claimant

LOWES HOME CENTERS LLC
Employer

APPEAL 16A-UI-12675-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/10/20
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 filed an appeal from the October 1, 2020, (reference 01) unemployment insurance decision that denied benefits based upon his quitting not caused by his employer. The parties were properly notified of the hearing. A telephone hearing was held on December 1, 2020. The claimant participated. The employer participated through Assistant Store Manager Wally Waldron.

ISSUE:

Was claimant discharged for willful 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 sales specialist from May 10, 2019, until this employment ended on January 17, 2020, when he was discharged.

Employer's attendance policy (Exhibit B) states employees are to report their absences to the manager on duty. If an employee fails to report an absence prior to the start of a shift, then employer considers this infraction a no call/no show. Employer's attendance policy further states three no call/no show incidents, absent extenuating circumstances, job abandonment. Employer has an application that employees use to verify their scheduling. The attendance policy also outlines how employees can request a leave of absence.

In late-November and December 2019, claimant called in sick for seven shifts. Claimant worked several scheduled shifts in late December 2020. Claimant then called in sick for seven shifts in the first full week in January 2020.

On January 6, 2020, claimant alleges he went to his family care doctor after calling in sick for one of his shifts. The doctor told him to stay hydrated and released him to return to work that same day. Claimant believes he had Covid19.

On January 7, 2020, claimant alleges he spoke with Store Manager Bill Bryson (Bryson) when he had to cut another shift short because he felt ill. Claimant's timecards (Exhibit A) reflect he worked for roughly an hour and a half on that day. During that conversation, Bryson told claimant he could not return until he had requested a leave of absence from employer's leave contractor, Sedgwick, and then be released to return to work.

Claimant alleges he subsequently requested a leave of absence from Sedgwick, but also expressed uncertainty about how to make such a request. Initially, the claimant said the employer would have been aware of his need to be absent due to past times he requested sick time. Claimant also stated several times that the employer did not explain how to request a leave of absence from Sedgwick. At the end of his testimony, claimant said he called Sedgwick, but could not request a leave of absence because he did not have documentation of a diagnosis. Waldron maintained he was not aware of claimant making a request to Sedgwick.

Claimant was scheduled to work on January 10, 11, 12, 15, 16 and 17, 2020. Claimant did not call in sick or work any of these shifts. Claimant maintains he did not check his schedule for this week because Bryson told him to not come back until he received a release from Sedgwick.

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).

Iowa Code § 96.5 provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

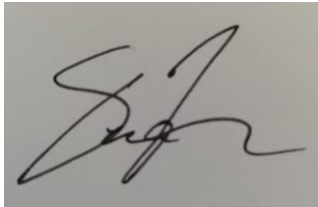
1. Voluntary quitting. If the individual has left voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall be disqualified if the department finds that:

(d) The individual left employment because of illness, injury, or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury, or pregnancy, when recovery was certified by a practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

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. Claimant had six unexcused absences in his final week of employment. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The October 1, 2020, (reference 01) unemployment insurance decision is affirmed. 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.



Sean M. Nelson
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December 31, 2020
Decision Dated and Mailed

smn/mh