

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

WILL L KREPS
Claimant

APPEAL NO. 12A-UI-11831-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

OC: 09/02/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Will Kreps (claimant) appealed a representative's September 24, 2012 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Kinseth Hotel Corporation (employer) for repeated tardiness in reporting for work after having been warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 9, 2012. The claimant participated personally. The employer was represented by Dina Smith, hearings representative, and participated by Shana Craven, general manager; Jason Mailey, chief engineer; and D.J. Miller, assistant general manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on September 29, 2011, as a full-time maintenance supervisor. The claimant signed for receipt of the employer's handbook on September 29, 2011. The claimant was tardy from time to time because the employer gave him emergencies to deal with before he could get to the time clock.

The employer issued the claimant a written warning for tardiness and another written warning for leaving work without permission on April 25, 2012. The employer notified the claimant that further infractions could result in termination from employment. The claimant's supervisor gave him permission to leave work to get a pain pill so the claimant could continue working. The claimant was tardy for work due to an emergency. Raw sewage was backing up into his home and he was waiting for a plumber.

On September 5, 2012, the claimant was tardy because he was caring for his wife, who was ill after having chemotherapy. The employer terminated him when he appeared for work 38 minutes late.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 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.

871 IAC 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 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 Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

In this particular case, the employer provided only two prior incidents of attendance issues. One of those incidents was approved by the employer. The other was an unforeseen emergency. While the final incident did involve the care of a sick spouse and was a personal responsibility, the employer only provided two incidents in the claimant's employment of tardiness. Both events were emergencies in nature. The employer did not provide sufficient evidence of repeated intentional job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The claimant's and the employer's testimony is conflicting. The administrative law judge finds the claimant's testimony to be more credible. The employer testimony was inconsistent and it confused information regarding the final incident with other incidents.

DECISION:

The representative's September 24, 2012 decision (reference 01) is reversed. The employer has not met its burden proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw