

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**KEVIN M CAROLUS**  
Claimant

**IOWA MOLD TOOLING CO INC**  
Employer

**APPEAL 16A-UI-07098-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/29/16**  
**Claimant: Appellant (1)**

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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 June 20, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on July 15, 2016. The claimant participated personally. The employer participated through Dawn Gamerdinger, human resources coordinator. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**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: The claimant was employed full-time as a welder and was separated from employment on May 31, 2016, when he was discharged for excessive absenteeism or “pointing out”.

The employer has a no fault attendance policy which discharges employees upon incurring eight points in a rolling twelve month period. The employer also allows employees to use three personal days each year in lieu of receiving points. The claimant was made aware of the policy upon hire. The claimant incurred seven points based on absences June 20, 2015, August 12, 2015, September 10, 2015, December 7, and 14, 2015, February 18, 2016 and May 17, 2016. Three of the absences were due to illness, one was for divorce court and neither party recalled the reasons for the other absences. On May 24, 2016, the claimant was issued a final written warning for being at seven points.

The final incident occurred on May 26, 2016, when the claimant properly called his absence off by calling the attendance line, and reported he had a “family emergency.” The claimant had no unused personal days to avoid an infraction. The employer attempted to call the claimant both May 26 and 27, 2016 and left voicemail for him to return the call. The claimant did not return the calls, figuring he would just talk to the employer when he returned to work after the holiday

weekend. The reason the claimant missed work on May 26, 2016 was that when he called to check on his fiancée's grandmother, who was 95, she was unresponsive. The claimant went to her home and discovered she had doubled her medication and was "loopy". The claimant did not take her to the hospital but remained with her. The claimant's fiancée and her dad were out of town at the time. Upon arriving to work on May 31, 2016 after the Memorial Day holiday, the claimant made no efforts to meet with human resources in response to the voicemail he had received. Upon the employer contacting the claimant to discuss the absence, he disclosed the reason he had missed May 26, 2016. He was subsequently discharged.

### **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(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 of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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 duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider

the evidence using his or her own observations, common sense and experience. *State v. Holtz*, Id. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, Id. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. In this case, the claimant was discharged for excessive absences which exceeded the permissible amount of incurrences under the employer policy. The claimant was issued a final warning on May 24, 2016 and knew his job was in jeopardy. The claimant reported his absence on May 26, 2016, but was then unresponsive for two days while the employer left him messages to discuss the absence.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). Both parties were aware the claimant's job was in jeopardy given the warning on May 24, 2016. The employer was reasonable to inquire about what the family emergency was given the lack of information furnished by the claimant. The claimant received the messages but chose to disregard them, so the issue of whether his absence was excused could not be considered by the employer. Upon tending to the claimant's fiancée's grandmother, there is no reason why the claimant could not have responded to the calls, which may have helped preserve his job. The administrative law judge is not persuaded by the claimant's reason for non-compliance.

The employer has credibly established that claimant was warned that further unexcused absences could result in termination. The employer made the decision to discharge based on what information was furnished by the claimant, and based on the non-responsiveness of the claimant to the employer's multiple calls. The court has found it was appropriate to decide whether the absence was excused based on the information the employer had. *Spragg v. Becker-Underwood, Inc.* 672 N.W.2d 333, 2003 WL 22339237\*3 (Iowa App.2003); *c.f. Norland v. IDJS*, 412 N.W.2d 904, 910-11 (Iowa 1987) In *Spragg* the time off was, according to the claimant, for a sick child, but the claimant did not share specifics with the Employer. Similarly in the case at hand, the claimant may have had missed work on May 26, 2016 for a reason that could have been excused but did not disclose it to the employer or respond to employer calls about it. Based on the evidence presented, the administrative law judge concludes the final absence was unexcused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

**DECISION:**

The June 20, 2016, (reference 01) unemployment insurance decision is affirmed. The 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.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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