

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ZACHARY B HIBBERT**  
Claimant

**FAREWAY STORES INC**  
Employer

**APPEAL 16A-UI-05443-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/17/16**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the May 9, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 27, 2016. The claimant, Zachary B. Hibbert, participated personally. The employer, Fareway Stores Inc., participated through Director of Human Resources Theresa McLaughlin; Meat Market Manager Mark Kay; and Grocery Manager David Eisentrager. Employer's Exhibits 1 through 6 were admitted.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a meat market clerk. He was employed from January 19, 2010 until March 9, 2016. His job duties included assisting customers and cutting meat at the meat counter. Mr. Kay was his immediate supervisor.

The employer has an attendance policy stating that an employee must call into the store prior to their shift beginning to speak with management if they are unable to come to work. Claimant had received verbal warnings, written warnings, and a suspension regarding his attendance and failure to adhere to the policy requiring him to properly report his absences. The most recent warning prior to the final incident occurred in January of 2016. Employer also has a policy in place that states that an employee can be discharged from employment for dishonesty. See Exhibit 1.

On Friday, March 4, 2016 claimant was to report to work at 8:00 a.m. Claimant was ill but did not call in to notify management that he would not be at work due to illness until after his shift started. Claimant called and spoke to Brandon Wedeking, who was the assistant meat

manager. The two spoke on several occasions and claimant notified him that he would make it to work on the next day, Saturday, March 5, 2016, when he was scheduled to work next.

On Saturday, March 5, 2016 claimant was scheduled to work from 9:00 a.m. to 6:00 p.m. Claimant did not properly report his illness to management on this date prior to his scheduled shift start time. He did call in later in the day to advise Mr. Wedeking that he was still ill. At this time Mr. Wedeking placed claimant on suspension pending investigation for his failure to properly report his absences on March 4 and March 5, 2016.

On Monday, March 7, 2016 Mr. Eisentrager spoke to management and reported that he observed the claimant at Prairie Meadows Racetrack and Casino ("Casino"), located in Altoona, Iowa, on Saturday, March 5, 2016 at approximately 11:00 p.m. See Exhibit 3. Mr. Kay called and asked claimant to come into the store and give a statement as to his whereabouts over the weekend.

Claimant came into the store on Tuesday, March 8, 2016 and hand-wrote a three-page statement regarding his whereabouts over the weekend. See Exhibit 4. Claimant was never told during this conversation that he had been observed by a co-worker on the day he had called in sick to work at the Casino. After reviewing the statement and noting that it listed several details but did not state that he went to the Casino, management decided to call claimant back in to discuss the matter. Claimant came back into the office on Wednesday, March 9, 2016 to discuss whether he was at the Casino on Saturday night.

Claimant was asked directly if he was at the Casino Saturday night and he said he was not. Claimant was then told that a co-worker saw him at the Casino Saturday night and claimant said that was not true. Claimant then admitted that he was at the Casino but stated that he was there early Sunday morning and not Saturday night. Claimant contends he was at the Casino from approximately 2:30 a.m. to 5:30 a.m. on Sunday, March 6, 2016. Claimant admitted that he was at the Casino and that he failed to include that in his first statement to the employer. See Exhibit 5. The employer then discharged claimant for dishonesty. See Exhibit 2.

#### **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. Benefits are denied.

As a preliminary matter, I find that claimant did not quit. Claimant was discharged from employment for 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(4) provides:

(4) Report required. The claimant's statement and the 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.

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). The claimant had received verbal warnings, written warnings and a previous suspension for his failure to properly report absences. At the time he was discharged he was on suspension pending investigation. Claimant had been previously suspended for the same type of behavior. The claimant knew that he needed to come to work on time. He understood the attendance policy and knew that he needed to report any absences prior to his scheduled shift start times.

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); *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 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 is not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984)(emphasis added). 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). An employer's 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.

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.*, 321 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). In this case claimant had two unexcused absences in a row (Friday and Saturday). These were allegedly due to illness but not properly reported. Claimant was suspended pending an investigation. During the investigation the employer learned that claimant had been dishonest in failing to disclose that he was at the Casino less than eight hours after he had reported being too ill to work. Claimant was also well enough to walk to the store to get his paycheck prior to going to the Casino on the day he was allegedly too ill to work. These absences are excessive.

In the alternative, even if claimant's two unexcused absences were not excessive, his actions in being dishonest with his employer about whether or not he was at the Casino rises to the level of job-related misconduct. See *Hiland*, No. 12-2300 (Iowa App. July 10, 2013). One must look at the nature of the employee's work, the effect of the employee's absence, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of the absence. *Sallis*, 437 N.W.2d 895, 897 (Iowa 1989). Here the claimant was a meat clerk and he does not have a higher level of behavior imposed upon him due to his job duties; however, he failed to properly report his absences for two days in a row. In fact, he specifically told his supervisor on Friday that he would be in on Saturday when they spoke on the telephone. Further, claimant was dishonest when he failed to report that he was at the Casino, whether it be either Saturday night or early Sunday morning. The purpose in the employer investigating this fact was to decide whether or not claimant was being truthful when he called in sick on Saturday, March 5, 2016. It is certainly suspect that claimant was too ill to work but was able to walk to work to get his paycheck on Saturday and then proceed to go to the Casino, according to claimant, five hours after getting his paycheck. Further, claimant was at the Casino, according to his own testimony, for approximately three

hours but did not initially disclose this to his employer when he was specifically asked about his whereabouts over the weekend.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incidents on March 4 and March 5, 2016 were not excused. The final absences, in combination with the claimant's history of unexcused absenteeism and dishonesty to the employer when questioned about his whereabouts over the weekend, amount to job-related misconduct. Benefits are denied.

**DECISION:**

The May 9, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/pjs