

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRENDEN M EILANDER
Claimant

KATHY FORRET
Employer

APPEAL 16A-UI-08964-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/17/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 9, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 2, 2016. Claimant participated. Employer participated through benefit and payroll coordinator Lydia Ahrold.

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: Claimant was employed full-time as an installation technician from September 30, 2013, and was separated from employment on July 21, 2016, when he was discharged.

The employer has a written attendance policy. The policy also provides that excessive absenteeism or tardiness will be defined as six occurrences within a six-month period. Claimant was aware of the employer's policy.

The final incident occurred when claimant was tardy on July 18, 2016 to his shift. Claimant and a coworker were scheduled to leave the shop to go to a job site in Illinois at 6:00 a.m. They did not leave at 6:00 a.m. Claimant sent a text message to his coworker 5:56 a.m. that he was running late and would get there as soon as he could. Claimant arrived at the shop at approximately 6:25 a.m.

On March 23, 2016, claimant was given a nine-day unpaid suspension because of his absenteeism issues. Claimant was warned that this would be his last suspension. March 22, 2016, was claimant's first scheduled day back from paid time off (PTO), but the vehicle claimant was in broke down in Nebraska and did not have access to his phone until 9:00 a.m. Claimant was supposed to work at 8:00 a.m. Claimant did not have any further any absenteeism issues From March 22, 2016 until July 18, 2016. The employer did not document six incidents of absenteeism between January 2016 and July 18, 2016.

On October 20, 2015, claimant was given a three-day unpaid suspension for absenteeism. On October 15, 2015, claimant was scheduled to leave at 5:00 a.m. for a job out of town. Claimant woke up just after 6:00 a.m. The power had gone out and claimant's alarm did not go off. The supervisor called claimant at 6:11 a.m. Claimant was told to stay home.

Prior to October 15, 2015, claimant had multiple tardies, but after his suspension on October 20, 2015, he started to work harder at getting to work on time. Claimant was also suspended on May 20, 2014 and March 5, 2014. Claimant received a written warning in November 2013.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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 are not considered excused. *Higgins, supra*.

An employer’s attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, the absences must still meet the excessiveness standard.

Even though an employer’s absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged him contrary to the terms of its own policy. The employer’s policy does not deem absences to be excessive unless there are six occurrences within a six-month period. Claimant only had three documented occurrences of absenteeism from October 15, 2015 until he was discharged (July 21, 2016). Thus, since the consequence of discharge was more severe than other employees would receive for similar conduct by the terms of the policy, the disparate application of the policy cannot support a disqualification from benefits. Furthermore, the employer has not established that three incidents of unexcused absenteeism in approximately nine months meet the excessiveness standard. The employer has not met its burden of proof to establish misconduct. Benefits are allowed.

DECISION:

The August 9, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs