

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY G ARNOLD
Claimant

APPEAL NO. 09A-UI-07523-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHESTERMAN CO
Employer

**Original Claim: 02-01-09
Claimant: Respondent (1)**

Section 96.6-2 – Timeliness of Protest
Section 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 15, 2009, reference 01, decision that found their protest untimely and allowed benefits. After due notice was issued, a hearing was held on June 9, 2009. The claimant did participate. The employer did participate through Jacki Sweisberger, Payroll Clerk; Ken Hagestrom, Manager; and (representative) Mike Sigaty, Route Supervisor. Department's Exhibit D-1 was received. Employer's Exhibit One was received.

ISSUES:

Was the claimant discharged for work-related misconduct or did he voluntarily quit his employment without good cause attributable

Did the employer file a timely notice of protest?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a route sales, full-time, beginning March 3, 2008, through December 9, 2008, when he was discharged.

The claimant's notice of claim was mailed to the employer's address of record on February 6, 2009. Ms. Sweisberger faxed the notice of protest on February 9, 2009 but it was not filed by Iowa Workforce Development. The employer received their statement of charges, which was their first notice that their account was being charged for claimant's benefits.

On December 9 the claimant called in absent to work due to a snow storm. Mr. Sigaty went to the claimant's home in order to bring him into work but was unable to get the claimant to answer the door. When the claimant checked his cell phone around 3:00 p.m., he found two messages from Mr. Sigaty, the last one telling him not to bother coming back to work the next day, as he was done. The claimant stopped reporting for work believing that he had been discharged.

Miranda Arnold, the claimant's wife, heard the message left by Mr. Sigaty telling the claimant that his job was done.

The claimant had missed work previously, but all prior absences were due to illness. The claimant had been verbally warned on October 3, 2008 about his absences but was never warned that one more unexcused absence would lead to his discharge.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

The administrative law judge concludes that the employer filed its protest within the time period prescribed by the Iowa Employment Security Law because they did file the notice of protest on February 9 but it was not received by the agency. The employer has established that they did file a timely notice of protest. This is sufficient evidence of intent to protest any potential charges to their account.

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

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).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's no-fault absenteeism policy is not dispositive of the

issue of qualification for benefits. The claimant was entitled to fair warning that the employer was no longer going to tolerate his performance and conduct, that is, his continued absenteeism. Without fair warning, the claimant had no way of knowing that there were changes he needed to make in order to preserve his employment. The claimant did properly report his absence on December 9, 2008. He was discharged when Mr. Sigaty left him a message indicating he was discharged. The employer's evidence does not establish excessive unexcused absenteeism, as absences due to illness are considered excused.

A failure to report to work without notification to the employer is generally considered an unexcused absence. One unexcused absence without a demonstrable history of other unexcused absences or warning is not disqualifying, as it does not meet the excessiveness standard. Benefits are allowed.

DECISION:

The May 15, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw