

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MICHAEL A KUHLMAN
PO BOX 883
MAQUOKETA IA 52060

CUSTOM-PAK INC
86 – 16TH AVE N
CLINTON IA 52732

Appeal Number: 05A-UI-07376-JTT
OC: 12/12/04 R: 04
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Michael Kuhlman filed a timely appeal from the July 13, 2005, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on August 3, 2005. Mr. Kuhlman participated. Human Resources Coordinator Vicki Rixen represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Kuhlman was employed by Custom-Pak as a full-time manufacturing team member trainee from May 2, 2005 until June 14, 2005, when Human Resources Coordinator Vicki Rixen discharged him for excessive absences. There was no other basis for the discharge.

Mr. Kuhlman was assigned to the third shift and worked from 11:00 p.m. until 7:20 a.m. The final absence that prompted the discharge occurred on June 13-14, when Mr. Kuhlman was a "no-call, no-show" for his shift. Mr. Kuhlman telephoned the employer approximately an hour after the shift ended and spoke with Ms. Rixen. At that time, Mr. Kuhlman indicated he had just returned from Missouri, that he had an emergency, and asked whether he still had a job. Ms. Rixen advised that he did not. Mr. Rixen has also been a "no-call, no-show" for his overnight shift on June 12-13. Mr. Kuhlman was absent for these two shifts because he had gone to Missouri to visit his mother, who was ill. At the time Mr. Kuhlman returned from Missouri, both he and his son had pinkeye.

The employer has a verbal attendance policy that was discussed with Mr. Kuhlman during his orientation and of which Mr. Kuhlman was aware at the time he missed work. Under the policy, employees are expected to telephone a designated message line at least 30 minutes before the scheduled start of the shift if they need to be absent. For new employees such as Mr. Kuhlman, the employer considers a single absence without notifying the employer to be a voluntary quit and basis for termination of the employment.

Mr. Kuhlman had been absent from the employment on two prior occasions. On May 4, 2005, Mr. Kuhlman became ill while at work and his immediate supervisor instructed him to go home. On May 23, 2005, Mr. Kuhlman was absent due to illness and properly notified the employer.

On May 26, 2005, the employer issued Mr. Kuhlman a written reprimand for absenteeism.

REASONING AND CONCLUSIONS OF LAW:

The evidence in the record establishes that Mr. Kuhlman did not quit, but was discharged from the employment. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). Under Workforce Development rules, an employee who is absent for *three* consecutive shifts without giving notice to the employer in violation of a company rule is presumed to have voluntarily quit the employment without good cause attributable to the employer. See 871 IAC 24.25(4). Pursuant to the rule, Mr. Kuhlman's absence for two consecutive shifts was insufficient to create the presumption that he had quit. The evidence in the record further establishes that Mr. Kuhlman did not intend to quit the employment.

The question, then, is whether the evidence in the record establishes that Mr. Kuhlman was discharged for misconduct in connection with his employment based on excessive unexcused absences.

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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Kuhlman's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that the *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Mr. Kuhlman's absences for his June 12-13 shift and his June 13-14 shift were unexcused because Mr. Kuhlman did not properly notify the employer pursuant to the employer's policy. However, these two shifts were Mr. Kuhlman's only unexcused absences. Though the absences were unexcused, the administrative law judge cannot completely disregard Mr. Kuhlman's stated reasons for being absent, i.e. that his mother was ill, and that both he and his son were ill upon the return trip from Missouri. Though the employer was within its right to discharge Mr. Kuhlman, the administrative law judge concludes that under the circumstances, Mr. Kuhlman's unexcused absences were not excessive and did not amount to misconduct that would disqualify Mr. Kuhlman for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kuhlman was discharged for no disqualifying reason. Mr. Kuhlman is eligible for benefits, provided he is otherwise eligible.

DECISION:

The representative's decision dated July 13, 2005, reference 05, is reversed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/kjw