IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AVERY J FISCHER Claimant **HIGH PROPERTY MANAGEMENT LC** Employer	**APPEAL 23A-UI-07941-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/09/23** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the August 7, 2023 (reference 01) unemployment insurance decision that denied unemployment insurance benefits to the claimant based upon a discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on September 5, 2023. The claimant participated personally. The employer participated through witnesses Steve Dolezal and Antrell Williams. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUE:

Was the claimant's separation from employment disqualifying?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for this employer on May 18, 2022. He worked full-time as a maintenance technician. His normal working hours were from 8:30 a.m. to 5:00 p.m. Monday through Friday each week. Claimant also worked on-call hours for emergency maintenance issues that occurred. Claimant received a copy of the employee manual on his first day of employment. The manual contains a written policy that states excessive unexcused absenteeism may lead to discharge from employment.

On December 9, 2022; December 12, 2022; June 9, 2023, and June 26, 2023, the claimant received written disciplinary warnings regarding his tardiness to work. The final warning stated that continued tardiness would lead to discharge from employment.

Claimant had been tardy to work on June 2, 8, 9, 14, 22, 23 and 26, 2023. All these incidents of tardiness in June of 2023 were not properly reported an hour prior to the claimant's scheduled start time. After his tardiness on June 26, 2023, claimant was again tardy to work on June 28, 2023, and June 30, 2023. Claimant's normal practice was to contact the employer after he arrived at work, even though the employee handbook policy required him to contact his supervisor at least one hour prior to the start of his scheduled shift if he was going to be late to

work. Claimant contended that his tardiness was due to a medical issue; however, the claimant never requested a reasonable accommodation from the employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code section 96.5(2)a & d provide in pertinent part:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.
>
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of the 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 obligation to the employer. Misconduct by an individual includes but is not limited to all of the following: …
>
> (9) Excessive unexcused tardiness or absenteeism.
>
> …

The employer has the burden of proof in establishing disqualifying job-related misconduct.[1] In unemployment insurance benefits cases, the issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits.[2] What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions.[3] Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.[4] Such misconduct must be "substantial."[5]

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be

---

[1] *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).
[2] *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).
[3] *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).
[4] *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).
[5] *Id.*

> based on such past act or acts. The termination of employment must be based on a current act.

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.

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.[6] The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive.[7] The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.[8] Second, the absences must be unexcused.[9] The requirement of "unexcused" can be satisfied in two ways.

An absence can be unexcused either because it was not for "reasonable grounds".[10] Or, because it was not "properly reported."[11] Excused absences are those "with appropriate notice."[12]

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.[13] Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused.[14] Absences due to illness or injury must be properly reported in order to be excused.[15] Absences in good faith, for good cause, with appropriate notice, are not misconduct.[16] They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct.[17] Excessive absenteeism has been found when there have 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.[18]

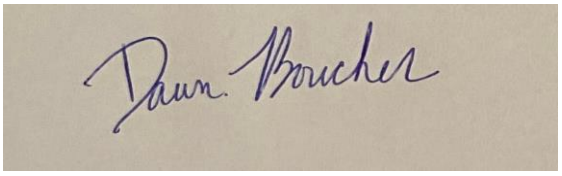
---

[6] 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."
[7] *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).
[8] *Higgins*, 350 N.W.2d at 192 (Iowa 1984).
[9] *Cosper,* 321 N.W.2d at 10 (Iowa 1982).
[10] *Higgins*, 350 N.W.2d at 191 (Iowa 1984).
[11] *Id*. and *Cosper*, 321 N.W.2d at 10 (Iowa 1982).
[12] *Cosper*, 321 N.W.2d at 10 (Iowa 1982).
[13] *Higgins*, 350 N.W.2d at 190 (Iowa 1984).
[14] *Id*. at 191.
[15] *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982).
[16] *Id*. at 10.
[17] *Id*.
[18] *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, the claimant's unexcused tardiness in the month of June of 2023 was excessive. Claimant had received prior warnings that continued tardiness may lead to discharge. Claimant's unexcused tardiness was substantial and rises to the level of job-related misconduct. The separation from employment is disqualifying and benefits are denied until the claimant requalifies and is otherwise eligible.

DECISION:

The August 7, 2023 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for substantial job-related misconduct. Unemployment insurance benefits are denied until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount after the June 30, 2023, separation date and provided he is otherwise eligible.



_____
Dawn Boucher
Administrative Law Judge

September 6, 2023
Decision Dated and Mailed

db/rvs

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

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. *There is no filing fee to file an appeal with the Employment Appeal Board.*

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may file a petition for judicial review in district court.

2. If you do not file an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at www.iowacourts.gov/efile. *There may be a filing fee to file the petition in District Court.*

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal. *No hay tarifa de presentación para presentar una apelación ante la Junta de Apelación de Empleo.*

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si no presenta una apelación de la decisión del juez ante la Junta de Apelación de Empleo dentro de los quince (15) días, la decisión se convierte en una acción final de la agencia y tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días. Puede encontrar información adicional sobre cómo presentar una petición en www.iowacourts.gov/efile. *Puede haber una tarifa de presentación para presentar la petición en el Tribunal de Distrito.*

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.