IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JORGE L CRUZ Claimant **ACE ELECTRIC INC** Employer	**APPEAL 21A-UI-13941-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/21/21** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Admin. Code r. 871-24.32(7) – Absenteeism
Iowa Code § 96.5(1) – Voluntary Quit from Employment

STATEMENT OF THE CASE:

On June 14, 2021, claimant Jorge L. Cruz filed an appeal from the June 8, 2021 (reference 01) unemployment insurance decision that denied benefits based on a determination that claimant voluntarily quit his employment. The parties were properly notified of the hearing. A telephonic hearing was held at 2:00 p.m. on Friday, August 13, 2021. The claimant, Jorge L. Cruz, participated and his daughter was present as well. The employer, Ace Electric, Inc., participated through Robin Schulty, Vice President. Claimant's Exhibits A and B were received and admitted into the record without objection.

ISSUE:

Did the claimant quit the employment without good cause attributable to the employer or was he discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed full time, most recently as a laborer, from September 17, 2018, until March 22, 2021, when he was discharged for absenteeism.

Claimant last reported to work and performed his job on March 16, 2021. He worked from 6:00 a.m. until 2:00 p.m. that day. Following his shift, claimant went to an Express Care clinic in Muscatine because he was not feeling well. Claimant received a COVID-19 test while at the clinic, and he was instructed not to return to work until he received a negative test result. (Claimant's Exhibit B) Claimant sent a text message to Ian, his supervisor, and let him know that he was not able to return to work until he tested negative for COVID-19. (Claimant's Exhibit A) Claimant took a picture of the doctor's note he received from Express Care and sent the picture to Ian. (Claimant's Exhibit A) Claimant did not report to work on March 17 or March 18, as he had not yet received his test results.

Claimant returned to work on Friday, March 19, after receiving a negative test result the prior afternoon. The employer had no work for him that day, so claimant was sent home. Claimant returned to work again on Monday, March 22, and the employer ended claimant's employment. Claimant handed over all of his equipment, and he confirmed with Ian that he could file for unemployment.

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.

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).

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); *Cosper*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The findings of fact show how the credibility disputes in this case have been resolved. The claimant presented consistent and believable firsthand testimony regarding prior warnings (or lack thereof) and the end of employment, coupled with documentation regarding his final absences. The employer, in contrast, relied entirely on secondhand testimony and presented neither a firsthand witness nor any documentation establishing a pattern of unexcused absenteeism or claimant's knowledge that his job was in jeopardy for absenteeism. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's testimony more credible than the employer's testimony.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Here, there is no evidence in the record that claimant received written warnings notifying him that he needed to improve his attendance or change the way he reported his absences in order to maintain his employment. Additionally, claimant's final absences were reported to the employer when claimant sent a text message including a doctor's note to Ian on March 16. Claimant cannot be blamed for the fact that Ian did not communicate this to upper management. Inasmuch as employer had not previously formally warned claimant about the issue leading to the separation, and claimant arguably did not engage in a final act of misconduct, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

DECISION:

The June 8, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge
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August 18, 2021
Decision Dated and Mailed

lj/scn