IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CRAIG A SHOWERS Claimant **CUNNINGHAM INC** Employer	**APPEAL 20A-UI-01296-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/05/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the February 11, 2020 (reference 03) unemployment insurance decision that found the claimant was not eligible for unemployment insurance benefits due to his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on March 2, 2020. The claimant, Craig A. Showers, participated personally. The employer, Cunningham Inc., participated through witness Betsy Miller. Employer's Exhibits 1 through 7 were admitted.

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 a mechanic and helper beginning November 29, 2018. His last day worked on the job was January 7, 2020. His job duties included assisting journeymen doing sheet metal installs as well as occasional plumbing and piping work. His immediate supervisor would vary depending on the job site. His work hours varied depending on the job site but typically started at 6:00 a.m. or 7:00 a.m.

The employer has a written attendance policy that the claimant received a copy of. See Exhibit 1. The policy provides that tardiness and absences tending to be habitual could lead to discharge. See Exhibit 1. The policy does not define the employer's definition of habitual. Claimant was discharged from employment due to violation of the attendance policy. The policy required that an employee report an absence from work at least thirty minutes prior to the scheduled shift start time. See Exhibit 1.

On October 3, 2019, the claimant was absent from work due to illness. He called his supervisor Phil and left a message that he would be absent due to illness at least thirty minutes prior to his scheduled shift start time. On October 23, 2019, claimant was absent from work due to a medical issue. He properly reported his absence at least thirty minutes prior to his scheduled shift start time. On October 24, 2019, claimant was absent from work and had prior approval to

be absent from work due to a medical issue. On October 29, 2019, claimant was absent from work but did not call in to notify the employer of the absence prior to his scheduled shift start time. On November 13, 2019, claimant was absent from work due to a medical reason and he did notify his supervisor Phil by telephone at least thirty minutes prior to his scheduled shift start time that he would be absent from work. On November 14, 2019, claimant was absent from work due to a medical issue and he did notify the employer properly about his absence. On November 20, 2019, he was absent from work and did properly notify the employer of his absence from work. He ended up going into the office that day to complete paperwork. On November 21, 2019, claimant was excused to miss work due to a medical issue. On November 25, 2019, claimant was tardy to work due to weather issues and did not call to notify his supervisor at least thirty minutes prior to his scheduled shift start time that he would be absent from work. On November 27, 2019, claimant was absent from work due to car troubles. He texted his supervisor at 5:26 a.m. of his absence. See Exhibit 4.

On December 3, 2019, claimant was absent from work due to illness, which he properly reported at 6:04 a.m. See Exhibit 4. On December 12, 2019, claimant was tardy to work due to oversleeping; however, he did text his supervisor at 5:52 a.m. to report his tardiness. See Exhibit 4. On December 16, 2019, claimant was tardy to work for an unknown reason. On December 23, 2019, claimant left work early but received permission to do so from his site supervisor. On January 6, 2020, claimant was absent from work due to illness and texted his supervisor at 6:46 a.m. about his absence, but it was not within the thirty-minute period required by the employer's written policy. The employer decided to discharge the claimant on January 6, 2020 and told him about the discharge on January 7, 2020 when he reported to the office.

For many of the absences, the claimant used personal time off to cover them. See Exhibit 5. Claimant received no discipline regarding attendance during the course of his employment. Claimant's job performance evaluation told him that his attendance was "proficient". See Exhibit 7. Claimant was not made aware that his job was in jeopardy due to attendance issues.

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, provided the claimant is otherwise eligible.

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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.

> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of 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 obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id*. at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. 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. *Id*.

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. *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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case, the claimant had six incidents of unexcused absenteeism from October 29, 2019 through January 6, 2020. Those incidents of unexcused absenteeism occurred on October 29, 2019; November 25, 2019; November 27, 2019; December 12, 2019; December 16, 2019; and January 6, 2020. However, the claimant was never warned, verbally or in writing, that his job was in jeopardy. Further, the employer's written policy would not have put the claimant on notice as to what amount of unexcused absences the employer believed was habitual under its policy, leading to potential discharge. Claimant was also told in his review that his attendance was proficient.

Inasmuch as employer had not previously warned claimant about the issues leading to the separation, 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. 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. The employer has failed to establish any intentional and substantial disregard of the employer's interest which rises to the level of willful misconduct. As such, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The February 11, 2020 (reference 03) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/scn