IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TRAVIS M TREBIAN Claimant **ASSOCIATED MILK PRODUCERS INC** Employer	**APPEAL 20A-UI-11640-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/24/20** **Claimant: Respondent (1)**

Iowa Admin. Code r. 871-24.32(1)A – Discharge for Misconduct

STATEMENT OF THE CASE:

On September 21, 2020, Associated Milk Producers Inc. (employer/appellant) filed an appeal from the September 15, 2020 (reference 04) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed on July 18, 2020 for absences that were due to illness and properly reported.

A telephone hearing was held on November 10, 2020. The parties were properly notified of the hearing. Employer participated by HR Office Manager Jackie Holz. Travis Trebian (claimant/respondent) participated personally.

Employer's Exhibit 1 was admitted. Official notice was taken of the administrative record.

ISSUE(S):

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

II. Was the claimant overpaid benefits? Should claimant repay benefits or should employer be charged due to employer participation in fact finding?

III. Is the claimant eligible for Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

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

Claimant's first day of employment was December 26, 2019. Claimant worked for employer as a full-time pasteurizer operator. Claimant's immediate supervisor was Josh Cummins. Claimant's schedule was two on, three off rotating over two weeks. There were times claimant was scheduled for mandatory overtime as well. The last day claimant worked on the job was July 19, 2020. Claimant separated from employment on July 23, 2020. Claimant was discharged on that date.

Claimant was discharged due to absenteeism. The most recent incident leading to discharge occurred on July 23, 2020. On that date, claimant was scheduled to work but did not appear as scheduled. Employer considered this a no-call, no-show absence and assigned four attendance points to claimant as a result. This put him beyond eight attendance points, which was the threshold for discharge.

Claimant did not appear for work on July 23, 2020 because he did not know whether his return to work had been approved by employer. Claimant was out sick the two prior days, on July 21 and 22, 2020. Claimant properly reported these absences to Jim Potter, who was in charge of the call-in process for absences. Claimant was waiting to hear back from Potter about whether he could return to work, as Mr. Potter had indicated claimant may not be able to based on employer's COVID-19 protocols. After not hearing from Potter, claimant reached out to Cummins. Cummins was unsure of whether claimant had been cleared to return to work.

After still not hearing from Potter, claimant finally determined to come and speak with Holz on the morning of July 23, 2020. He told Holz he was unsure of whether he could return to work and had been waiting to hear from Potter on this. Claimant provided Holz a doctors note at that time. He asked if he could clock in and work on that date. Holz said she would have to talk to other members of management about whether he could return to work. Holz subsequently contacted claimant and informed him of his discharge.

Claimant's most recent absence unrelated to illness occurred on July 12, 2020. On that day, claimant was unable to get to work due to transportation issues. Claimant properly reported this absence and performed work for employer after that date.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the September 15, 2020 (reference 04) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed on July 18, 2020 for absences that were due to illness and properly reported is AFFIRMED.

Iowa Code section 96.5(2)a provides:

> 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.

Iowa Admin. Code r. 871-24.32 provides in relevant part:

> 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(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 bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd*., 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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*, *supra*; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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, supra*; *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, supra*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc*., 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *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.

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 administrative law judge found claimant's testimony to be more reliable than Holz's testimony. This is because claimant had first-hand knowledge of important events at issue, such as the communications – or lack thereof - with Potter and Cummins. Holz did not have first-hand knowledge of these communications and so was largely unaware of if and when they occurred, as well as the substance thereof. Factual findings were settled accordingly.

Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). Claimant is therefore eligible for benefits, provided he meets all other eligibility requirements.

The administrative law judge finds the final incident leading to discharge – the absence on July 23, 2020 – was not misconduct. In order for an act to constitute misconduct, it must either be deliberate or be part of a pattern of careless or negligence that "manifest[s] equal culpability…" Claimant did not deliberately fail to report to work as scheduled on July 23, 2020. Claimant was unsure of whether to report to work, based on a lack of clarity and communication from employer. After waiting and making several attempts to determine whether he should appear for work on July 23, 2020, claimant finally took it upon himself to come to Holz personally to address the issue. Claimant's confusion and his actions as a result were reasonable and understandable in the circumstances. Therefore, the administrative law judge cannot find his failure to appear for work constituted misconduct.

Claimant's absences the prior two days do not constitute misconduct, either, as they were properly reported and were due to illness. The most recent absence which is considered unexcused under Iowa law occurred on July 12, 2020. On that day, claimant was unable to get to work due to transportation issues.

As noted above, misconduct must be current to be disqualifying. Because the unexcused absence on July 12, 2020 was not the final incident leading to discharge, it occurred more than a week prior to his discharge, and claimant was allowed to perform work after the incident, the administrative law judge finds it does not constitute a current act of misconduct.

DECISION:

The September 15, 2020 (reference 04) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed on July 18, 2020 for absences that were due to illness and properly reported is AFFIRMED. The separation from employment was not disqualifying. Benefits are allowed, provided claimant is not otherwise disqualified or ineligible.

Andrew B. Duffelmeyer
Administrative Law Judge
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November 18, 2020
Decision Dated and Mailed

abd/scn