

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARCUS L GREER
Claimant

ENGINEERED PLASTIC COMPONENTS INC
Employer

APPEAL 18A-UI-10186-NM-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 09/09/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 28, 2018, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on October 24, 2018. Claimant participated and testified. Employer participated through Human Resource Generalist Angela Janecek.

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 began working for employer on June 1, 2010. Claimant last worked as a full-time assembly operator. Claimant was separated from employment on September 12, 2018, when he was discharged.

The employer has an attendance policy in place which allows employees to accumulate up to seven attendance points in a calendar year before termination is considered. Employees are given a half point for tardies or leaving early, a full point for calling in, and two points for a no-call/no-show. Warnings are issued at three and five points. When an employee reaches seven points they can be discharged or given a final warning and suspension. In addition to the attendance points, employees are given five personal days to use each year. Points are not issued if an employee uses a personal day when absent. Claimant was aware of the attendance policy.

In 2018 claimant called into work and took personal days on February 6, February 9, March 5, and April 17. Claimant left early, taking a half a personal day, on April 27. Claimant called in on April 30 and used his last half a personal day and was issued a half a point. On May 23, claimant left work early to pick up a sick child from daycare and was issued a half a point. Claimant left work early on May 30 for “appointments and stuff.” Claimant testified he was not sure what his appointments were for or what else he may have had to do that day. Claimant left work early on June 7 and was issued a half point. He was issued a full point for calling in on

June 11. On June 12 claimant received a verbal warning regarding his attendance. Claimant left work early on June 20 because he was not feeling well and was issued a half point. He received full points for calling in on June 21 and 27. Claimant was issued a written warning for his attendance on July 11, 2018. Claimant was given a half a point on July 18 when he left early and a full point for calling in on August 6.

The August 6 absence brought claimant to seven attendance points. Rather than terminate him from employment, claimant was given a final written warning, on August 7, and advised that if he missed any more work prior to the end of the year he would be discharged from employment. Unless specifically noted, claimant did not provide the employer with reasons for any of his absences. Claimant testified he was absent because either himself or his children were sick. Claimant estimated he was sick approximately three times, though he could not provide specific dates for his illnesses. Claimant is not the sole care provider for his children, but alternates taking time off work with the children's mother.

On September 11, 2018, claimant asked his supervisor if he could leave early for the day to go to an appointment with a landlord to look at a house. Claimant was advised that if he took any additional time off work he would be discharged, so he stayed and worked the rest of the day. The next morning claimant called in to report he would not be in to work. Claimant did not give a reason why he would not be in. Claimant testified he was calling in because he was not feeling well. Initially claimant testified he had a doctor's excuse for missing work that day, but then later stated he lost it. Claimant then testified he did not go to the doctor and that he meant he had an excuse for needing to miss work to look at a house the day before. When claimant called back to the employer he was informed that he had been discharged from employment. Claimant was not asked about the reason for his absence, but did not mention being sick.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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(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 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*, 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. 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.

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). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge does not find the claimant's version of events to be credible. Claimant was only able to provide minimal and vague explanations for his absences leading up to his termination. The timing of claimant's final absence is somewhat suspicious given that just one day before he had requested time off to address a personal matter. Claimant's testimony regarding his final absence was inconsistent and contradictory. For these reasons, claimant's contention that his absences, other than the one on June 20, were due to illness is not credible.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned, on August 7, 2018, that further unexcused absences could result in termination of employment. In addition to the final warning, claimant was very clearly advised on September 11 that any additional absences would lead to termination. Despite this warning, claimant called in on September 12. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The September 28, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs