IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

STUART V TIMMERMAN Claimant **WINEGARD COMPANY** Employer	**APPEAL 16A-UI-06516-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/27/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 6, 2016 (reference 02) unemployment insurance decision that denied benefits based upon his discharge from employment for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 27, 2016. The claimant, Stuart V. Timmerman, participated personally. The employer, Winegard Company, did not participate.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a press operator. He was employed by this employer from September 2012 until May 19, 2016. His job duties included operating the press in the factory. His lead supervisors were Tyler Jones and Stryder Thomas. Shawn Mears was the floor supervisor.

The employer has a policy in place regarding absenteeism where the employees are assessed points if they are tardy or have an unscheduled absence. The claimant was discharged for absenteeism when he reached five points.

Claimant was verbally told when he had reached four points prior to his discharge but did not receive any documentation regarding this. Claimant had not received any verbal or written discipline prior to his discharge.

Claimant was given a paid day of vacation for his birthday, which he could take the week prior or the week of his birthday. Claimant filled out paperwork and submitted the appropriate paperwork to take this paid date on May 19, 2016. This date was approved by his immediate lead supervisors. Claimant did not call in or show up to work on May 19, 2016 because he believed he had this date off from work.

On May 19, 2016, a woman from human resources called claimant and said that Mr. Mears had not approved his date off and that he was incurring his fifth and final point for absenteeism. Claimant was discharged over the telephone on this date for failing to come to work.

Claimant incurred his other points for dates missed or being tardy on March 18, 2016; April 18, 2016; May 4 to 6, 2016; and May 14, 2016. On March 18, 2016, claimant left early on this date because they were finished with their parts for the date. Because they worked four, ten-hour days employees were allowed to leave early on that Friday.

Claimant was gone from work on April 18, 2016 because his toddler son was ill. Claimant had previously been approved for Family and Medical Leave Act ("FMLA") leave for his son's medical condition in October 2015 and that approval lasted for one calendar year. He believed that he was able to use FMLA leave on April 18, 2016; however, his supervisor did not approve it. Claimant called in prior to his shift start time on this date notifying his employer he would not be in on April 18, 2016. Claimant learned that it would not be approved FMLA leave after we was off for the day.

Claimant was home with his ill toddler on May 4 to 6, 2016, as well due to the same illness. Claimant called in prior to his scheduled start shift time on these dates. Claimant believed that he was able to use FMLA leave on these dates for his ill son; however, his supervisor did not approve it. Claimant learned of this non-approval after he came back to work and he incurred a point for this absence. On May 14, 2016, claimant was running late and was tardy to work.

There is no process in place to appeal the issuance of points by a supervisor. Claimant was told by the human resources department that he could be re-hired by the company when he was discharged.

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.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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, (4), and (8) provides:

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

> (4) Report required. The claimant's statement and the 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.
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> (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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. Iowa Admin. Code r. 871-24.32(7); *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 58.

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. Second, the absences must be unexcused. *Cosper,* 321 N.W.2d 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*, 350 N.W.2d at 191. It can also be unexcused because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. *Higgins*, 350 N.W.2d at 190. 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 at 10-11. 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*.

Claimant's April 18, 2016 and May 4 to 6, 2016 absences were due to his toddler son's illness and were properly reported. Claimant had been approved for FMLA leave for these types of instances. These dates are properly reported and for good cause. These absences are excused.

Claimant left early on March 18, 2016 because his line had completed the parts that were required for that date. The employees had been told that they could leave once their parts were completed. Claimant followed instructions and as such this is for good cause and is excused.

Claimant was late on May 14, 2016. While he properly reported his tardiness it was for reasons of personal responsibility and not for good cause. As such, this instance of tardiness is unexcused.

Claimant's May 19, 2016 absence was excused because he had already requested and been approved by his supervisors for this date to be a paid holiday. He was never told that his request for leave was not granted and that he had to work. He had been told by his supervisors in the past that they will notify you directly if a request for leave was not granted. He was never notified that his request was not granted and rightfully believed that he was scheduled to be off of work on this date. There was no requirement for him to call in on that date because he was not scheduled to work. There is no current act of misconduct.

As such, claimant had one unexcused tardy on May 14, 2016. Excessive absenteeism has been found when there has 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. In this case, there is one absence that was unexcused on May 14, 2016 and as such this is not excessive.

The employer has failed to establish that the claimant was discharged for job-related misconduct, which would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The June 6, 2016 (reference 02) unemployment insurance decision denying benefits 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.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

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