IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

MOSES SAYPLAY Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 17A-UI-06631-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/04/17** **Claimant: Appellant (2)**

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

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 27, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 18, 2017. The claimant participated personally. Claimant witness, Tina Kamara, was unavailable when called for the hearing. Woneay Nimley, friend of the claimant, testified on his behalf. The employer registered a phone number for Chelsee Corneilius, human resources, but she was unavailable when called at the number registered and did not respond to a voicemail directing the employer to call the Appeals Bureau immediately if it wished to participate. Claimant Exhibit A was received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a marker and was separated from employment on June 5, 2017, when he was discharged by human resources for exceeding the permissible attendance points.

The claimant acknowledged the employer used a no-fault attendance point system that designated point values to attendance infractions. Upon receipt of 10 points in a rolling twelve month period, an employee could be discharged. In addition, the claimant was aware that he was expected to call the attendance hotline within 30 minutes of his shift start time to properly report an absence.

The claimant received a written warning for being at 6 points on May 30, 2017. The claimant also had incurred injury to both hands from work and had been receiving treatment through

worker's compensation. Due to extensive pain on May 30, 2017, the claimant informed human resources he needed to see a doctor immediately. His doctor was unavailable so he left work early to go to the emergency room. He was seen by a physician and placed on light duty as well as given pain medication (Claimant Exhibit A). For the next few days, the claimant had serious side effects, as observed by Mr. Nimely, including inability to even hold a conversation, and being ill to the point of staying in bed for several days. For his shifts on May 31, June 1 and June 2, he called off his absence to the attendance hotline with proper notice. On May 31 and June 1, 2017, the claimant also called a human resources officer, Rogelio, and left a voicemail. He was unsure if he was scheduled to work on June 3, 2017. On June 5, 2017, the claimant returned to the employer and brought with him a doctor's note stating he had been seen and prescribed medication (Claimant Exhibit A). The note did not state explicitly the claimant was removed or excused from work for May 30, 31, June 1 or June 2, 2017 (Claimant Exhibit A). When the claimant attempted to present the doctor's note to human resources, it was not accepted because there was no language excusing him from work. If the doctor's note had language about excusing him from work, his points could have been reduced. Because the note was not accepted, the claimant accrued four more points for leaving early on May 30, and being absent (even though properly reported) on May 31, June 1 and June 2. He was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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(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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the

unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

An employer's "no fault" attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. In this case, the claimant credibly testified that he was issued a warning on May 30, 2017, for accumulating 6 attendance points. The claimant was aware that incurring 10 attendance points in a twelve month period could result in discharge. The claimant accrued attendance infraction points on May 30, 2017, when he notified human resources that he needed to go to the emergency room due to continued pain. He then visited the emergency room who provided him pain medication and advised light duty work (Claimant Exhibit A). The claimant experienced significant side effects from the pain medication and could not perform work for his shifts on May 31, June 1 and June 2, 2017. The claimant could not recall if he was scheduled on June 3, 2017. For each of his absences between May 31 and June 2, the claimant properly reported his absence to the attendance line and at least on two occasions, also called human resources. When the claimant returned to work on June 5, 2017, he attempted to present a doctor's note but because it did not state he was "excused" from work, it was not accepted by the employer, to reduce his points, causing him to "point out."

The claimant's absences due to illness on May 31, June 1 and June 2, 2017, were properly called off, and attributed due to illness, and therefore excused in the context of this analysis. The employer subsequently discharged the claimant after his absences May 31, June 1 and June 2, 2017, all attributed to illness. The administrative law judge recognizes the strain the claimant's attendance history may have had on the employer, but medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Therefore, the final four absences (including leaving early on May 30, 2017 to go to the emergency room) were due to illness and which were properly reported, would be considered excused.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The June 27, 2017, (reference 01) decision is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn