IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RYAN A MASON Claimant **WESTAR FOODS INC** Employer	**APPEAL 20A-UI-10299-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/17/20** **Claimant: Appellant (2R)**

Iowa Code § 96.19(38) – Total, partial unemployment
Iowa Code § 96.4(3) – Eligibility – A&A – Able to, available for, work search
Iowa Admin. Code r. 871-24.23(26) – Eligibility – A&A – Part-time same hours, wages
Iowa Code § 96.7(2)a(2) – Charges – Same base period employment

STATEMENT OF THE CASE:

On August 17, 2020, Ryan Mason (claimant/appellant) filed a timely appeal from the Iowa Workforce Development decision dated August 13, 2020 (reference 01) that denied benefits as of May 17, 2020 based on a finding claimant was still employed for the same hours and wages and therefore not partially unemployed.

A telephone hearing was held on October 9, 2020. The parties were properly notified of the hearing. Claimant participated personally. Westar Foods Inc. (employer/respondent) participated by General Manager Samantha Gyles and was represented by Employer Representative Tim Speir. The parties waived notice on the issue of separation from employment.

Official notice was taken of the administrative record.

ISSUE(S):

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

II. Is the claimant totally, partially, or temporarily unemployed?

III. Is the claimant able to and available for work?

IV. Is the claimant still employed at the same hours and wages? Is the employer's account subject to charge?

FINDINGS OF FACT:

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

Claimant began working for employer most recently on February 21, 2020. Claimant is not still employed by employer. Claimant was employed part-time as a crew member. Claimant typically worked afternoons/evenings and worked an average of 25 to 30 hours per week. Claimant's hours were not reduced. Gyles was claimant's immediate supervisor beginning April 20, 2020. Claimant was discharged due to absenteeism.

Employer's policy requires employees to call in at least two hours in advance of an absence and either report how long they will be gone or to call each day they will be out. Claimant did not appear for work for several days due to illness. Claimant's absences began around May 26 or 27, 2020, and continued until June 2 or 3. Gyles could not provide the specific days claimant was scheduled to work but was absent.

Claimant called in on the first day he was absent and reported he had the flu and could not get out of bed. He reported this to Jen, a shift leader, who told him he needed to provide a doctor's note. He did not call in each day after that as he thought it was sufficient that he had reported he had the flu and so it was clear he would not be able to work for several days. Claimant tried to call in again later but "got the run around," was told Gyles was busy, and was told he would receive a call back. He did not get a call back.

Claimant was too ill to see the doctor until June 2 or 3, 2020. He went straight from the doctor to work to provide the note. Claimant spoke to shift leaders Jen and Niki who said they would not accept the doctor's note because claimant had already been discharged.

Gyles testified claimant was absent for several days and did not call in to report those absences. She testified this was considered a voluntary quit. However, as noted above, she could not provide the specific days claimant was absent without reporting. Gyles testified she was unaware of the reason for the absences. Gyles testified she spoke with Jen, who did not mention claimant calling in or appearing with a doctor's note. Gyles's phone number is accessible to employees, including her personal number where employees could leave a voicemail or text message.

Claimant has filed a weekly claim for benefits each week from the benefit week ending May 23, 2020 and continuing through the benefit week ending October 10, 2020. Claimant reported earnings of $205.00 for the benefit week ending May 23, 2020 and $265.00 for the week ending May 30, 2020. He reported no earnings in the following weeks. Claimant is not eligible for benefits for the weeks ending May 30, 2020 and June 6, 2020, as he was ill and unable to work those weeks. He received benefits in the amount of $157.00 in the benefit week ending June 6, 2020, as well as Federal Pandemic Unemployment Compensation (FPUC) in the amount of $600.00. Claimant is able to and available for work after that time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the August 13, 2020 (reference 01) that denied benefits as of May 17, 2020 based on a finding claimant was still employed for the same hours and wages and therefore not partially unemployed is REVERSED. Claimant's separation from employment was not disqualifying. Claimant totally unemployed and able to and available for work from the benefit week ending June 13, 2020. Claimant is eligible for benefits from that date, provided he is otherwise eligible.

As an initial matter and for the reasons set forth below, the administrative law judge finds claimant did not voluntarily quit but was discharged.

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.

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).

It is very difficult to determine the facts in this case. This is due in part to the absence of independent evidence. Neither party provided third-party witnesses such as Jen or Niki. Neither party provided independent, documentary evidence such as work schedules; time records; call logs; or doctor's notes. This testimony and documentary evidence would have gone a long way in clarifying the events at issue.

Nonetheless, 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 finds claimant's testimony to be more reliable than the testimony offered by Gyles. This is because claimant had first-hand knowledge of his communications with employer regarding his absences. Gyles had no first-hand knowledge of these communications, and employer did not produce other staff who did. The administrative law judge has no reason to disbelieve the credible testimony offered by claimant. The testimony from Gyles was also credible but she had little first-hand knowledge regarding claimant's absences. Factual findings were made accordingly.

Based on the evidence presented, the administrative law judge cannot find that claimant's absences were unexcused and excessive. Employer could not provide the dates claimant was absent. Claimant was absent for several days but called in on the first day and reported he had the flu. This appears to be sufficient based on employer's policy as stated by Gyles. He also tried to call in subsequently but "got the run around," and returned with a doctor's note but was turned away. Based on the evidence available, the administrative law judge finds claimant's absences were due to illness and were properly reported.

Claimant was too ill to see the doctor until June 2 or 3. He went straight from the doctor to work to provide the note. Claimant spoke to shift leaders Jen and Niki who said they would not accept the doctor's note because claimant had already been discharged. His separation from employment was therefore not disqualifying.

Iowa Code section 96.19(38) provides:

> "*Total and partial unemployment".*
>
> *a.* An individual shall be deemed "*totally unemployed*" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.
>
> *b.* An individual shall be deemed partially unemployed in any week in which either of the following apply:
>
> (1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.
>
> (2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.
>
> *c.* An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Claimant has filed a weekly claim for benefits each week from the benefit week ending May 23, 2020 and continuing through the benefit week ending October 10, 2020. Claimant reported earnings of $205.00 for the benefit week ending May 23, 2020 and $265.00 for the week ending May 30, 2020. He reported no earnings in the following weeks. Claimant is not eligible for benefits for the weeks ending May 30, 2020 and June 6, 2020, as he was ill and unable to work those weeks. Claimant is eligible for benefits from the benefit week ending June 13, 2020, as he was totally unemployed and able to and available for work after that time.

DECISION:

The August 13, 2020 (reference 01) decision that denied benefits as of May 17, 2020 based on a finding claimant was still employed for the same hours and wages and therefore not partially unemployed is REVERSED. Claimant's separation from employment was not disqualifying.

Claimant is totally unemployed and able to and available for work from the benefit week ending June 13, 2020. Claimant is eligible for benefits from that date, provided he is otherwise eligible.

REMAND:

It appears claimant may have been overpaid benefits and FPUC for the benefit week ending June 6, 2020. This issue is remanded to the Benefits Bureau for a decision with right of appeal.

Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

October 14, 2020
Decision Dated and Mailed

abd/scn

***Note to Claimant*:**

If you disagree with this decision, you may file an appeal with the Employment Appeal Board by following the instructions on the first page of this decision. If this decision denies benefits, you may be responsible for paying back benefits already received.

Individuals who are disqualified from or are otherwise ineligible for **regular** unemployment insurance benefits but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility.** Additional information on how to apply for PUA can be found at https://www.iowaworkforcedevelopment.gov/pua-information.