

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DALTON J CROSSER
Claimant

IOWA PREMIUM, LLC
Employer

APPEAL 21A-UI-23670-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/11/20
Claimant: Appellant (1)

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Claimant, Dalton Crosser, appealed the October 11, 2021, (reference 02) unemployment insurance decision that denied benefits based upon claimant being discharged September 2, 2021 for excessive unexcused absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on December 16, 2021. The claimant participated. The employer, Iowa Premium, LLC participated through Veronica Hernandez, human resources clerk. Judicial notice was taken of the administrative file.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed full time with a job title of refrigeration technician/maintenance. Their first day of work being October 20, 2020 and his last day worked was August 25, 2021. It was his scheduled time off and when he went to return to work on September 2, 2021, security escorted him to human resources, where Jenny Mora and Bo (claimant's supervisor) terminated claimant for excessive absenteeism and tardiness reaching too many points in their attendance point system.

Employer has an employee handbook that contains policies, including policies on attendance and how to reporting absences and being late and the companies point system for being discharged from work for too many absences. Claimant was provided a copy when he started employment. Claimant has knowledge of these policies. The below history reflects claimant's unexcused absences and warning history with employer. None of the below were properly/timely reported.

| DATE | INCIDENT | POINTS | TOTAL |
|----------|----------------------------|--------|-------|
| 08/24/21 | Tardy < 1 hour | ½ | 18 |
| 08/16/21 | 60 days perfect attendance | - 1 | 17 |
| 06/30/21 | Warning at 18 points | | |
| 06/18/21 | Tardy < 1 hour | ½ | 18 |
| 05/07/21 | Warning at 17½ points | | |
| 04/30/21 | Tardy < 1 hour | ½ | 17½ |
| 03/08/21 | Warning at 17 points | | |
| 03/08/21 | Warning at 16½ points | | |
| 03/03/21 | Tardy < 1 hour | ½ | 17 |
| 02/24/21 | Tardy < 1 hour | ½ | 16½ |
| 01/14/21 | Final Warning at 16 points | | |
| 01/14/21 | Warning at 14 points | | |
| 01/14/21 | Warning at 12 points | | |
| 01/14/21 | Warning at 10 points | | |
| 01/10/21 | No Call No Show | 2 | 16 |
| 01/09/21 | No Call No Show | 2 | 14 |
| 01/08/21 | No Call No Show | 2 | 12 |
| 01/07/21 | No Call No Show | 2 | 10 |
| 01/02/21 | No Call No Show | 2 | 8 |
| 01/01/21 | No Call No Show | 2 | 6 |
| 12/11/20 | Warning - attendance | | |
| 12/07/20 | Warning - attendance | | |
| 12/05/20 | No Call No Show | 2 | 4 |
| 11/29/20 | Warning | | |
| 11/27/20 | Tardy < 1 hour | ½ | 2 |
| 11/18/20 | Tardy < 1 hour | ½ | 1½ |
| 11/17/20 | Tardy < 1 hour | ½ | 1 |
| 11/02/20 | Counseling - attendance | | |
| 10/27/20 | Tardy < 1 hour | ½ | ½ |

Claimant had numerous warnings, many of which had language regarding further incidents can lead to discipline, including termination. Employer used to terminate at 12 points, but due to the need for employees and COVID, has relaxed the points to 18 points prior to termination.

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 section 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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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 twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). 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. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. See, *Gimbel v. Emp’t Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant’s late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep’t of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

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 claimant was warned further unexcused absences could result in termination of employment and the final absence was not excused. However, the final absence, in combination with the claimant’s history of unexcused absenteeism, is not considered excessive. While the employer’s policy (teamster’s contract) may allow them to be called unexcused, many of the absences are excused for purposes of unemployment insurance benefits, as set forth above, since the absences were due to illness and were properly reported.


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, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer’s version of events to be more credible than the claimant’s recollection of those events. Claimant’s assertions that the warnings were mere notifications of reaching certain attendance point thresholds and that while he did not agree with many of them, he signed off on them is incredible. His offered rationale for the misses he disagreed with were due to being late as there were some childcare drop off/pick up issues between him and his wife (which reason does not excuse the lateness). Regarding the January 8-10 no call no show, claimant thought he got his schedule changed with his start time being later, but the conversation he had with his supervisor, Bo, Bo told claimant he’d have to verify the time change. Claimant admitted he never heard back from Bo on whether the change was authorized and claimant just assumed it was approved, which does not excuse the no call no shows.

The employer has proved claimant was discharged from work on September 2, 2021 for excessive unexcused absenteeism and tardiness after being warned. Misconduct is applied.

DECISION:

The October 11, 2021, (reference 02), unemployment insurance decision is **AFFIRMED**. Claimant was discharged from employment for a disqualifying reason. 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.



Darrin T. Hamilton
Administrative Law Judge

January 19th, 2022
Decision Dated and Mailed

dh/rs