IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RONALD L DIGGS Claimant **ELS OF FLORIDA INC** Employer	**APPEAL 15A-UI-05193-EC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/18/14** **Claimant: Appellant (1)**

Iowa Code §96.5(2)a – Discharge for Misconduct
Iowa Administrative Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant/appellant, Ronald Diggs, filed an appeal from the April 29, 2015, (reference 03) unemployment insurance decision that denied benefits due to his discharge for misconduct, based upon his excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on June 5, 2015. The claimant participated. The employer participated through Jim Clyde. The claimant submitted exhibits, which were marked Exhibits C, C1 and C2. These exhibits were admitted into the record without objection.

ISSUE:

Was the separation from employment a discharge without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed on a temporary and per event basis, beginning on or about November 3, 2011.[1] His employment ended on April 3, 2015, when he was discharged due to excessive unexcused absenteeism. The last day he worked was March 28, 2015.

The employer, ELS of Florida, Inc., owns Labor Finders, a staffing agency. The claimant sometimes worked general labor jobs, such as light industrial or pallet work. He also performed per-event banquet work, serving at a banquet or setting up events. (Clyde testimony; Diggs testimony) His employment was terminated after he was a "no-call/no-show" for a banquet on April 3, 2015. (Exhibit C2)

In general, if the claimant could not or would not work a certain event or assignment, he was required to "call off" that event or assignment at least two or three hours before he was scheduled to work. The claimant was a "no-call/no-show" or improperly "called-off" the work he

[1] He had previously worked for this employer, off and on, beginning on December 16, 2003.

was scheduled to perform, twenty-three times, between June 20, 2014 and April 3, 2015. (Clyde testimony)

The claimant received a previous written warning on December 19, 2014, when he provided inadequate notice when "calling off" for his scheduled banquet work. (Exhibit C1) The claimant was a "no-call/no-show" for a banquet event on January 4, 2015. He did not receive a written warning for that unexcused absence. In addition, the claimant failed to report for work as scheduled eight times between his first written warning on December 19, 2014 and his termination on April 3, 2015. (Clyde testimony)

The claimant asserted that he should have received at least one more additional written warning before his employment was terminated. (Diggs testimony) The employer stated that a second written warning could be a termination, in accordance with general policies and procedures. All the employees who failed to report as scheduled for the banquet event on April 3, 2015 were terminated. (Clyde testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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.

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. 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). An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. Despite the lack of a second written warning, the employer credibly established that the claimant was warned, and was aware, that further unexcused absences could result in termination of employment. The final absence was not excused. The final absence, in combination with claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The April 29, 2015, (reference 03) decision is affirmed. The 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.

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Emily Gould Chafa
Administrative Law Judge

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Decision Dated and Mailed

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