

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMEEL T FOUNTAIN
Claimant

APPEAL 17A-UI-04412-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WHIRLPOOL CORPORATION
Employer

**OC: 04/02/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Jameel T. Fountain (claimant) filed an appeal from the April 20, 2017, reference 01, unemployment insurance decision that denied benefits based upon the determination Whirlpool Corporation (employer) discharged him for excessive unexcused absenteeism after being warned. The parties were properly notified about the hearing. A telephone hearing was held on May 11, 2017. The claimant participated. The employer participated through Human Resource Specialist Eric McGarvey. No exhibits were offered.

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 Production Specialist beginning on June 23, 2015, and was separated from employment on March 31, 2017, when he was discharged.

On December 20, 2016, the employer distributed a new attendance policy that would take effect on January 1, 2017. The new policy was not very different from the old, but no longer differentiates between time off for personal reasons and illness. The claimant worked that day and received a copy of the policy. The new policy states employees can take five personal days in a 12-month period without penalty, on the sixth personal day the employee receives a first written warning, the seventh personal day results in a second written warning, and the eighth personal day results in termination.

The claimant missed work on February 7, 2017 due to his own personal illness. He notified the employer of his absence. On February 20, 2017, the claimant missed work due to issues with his car and properly notified the employer. On February 28, 2017, the claimant missed work due to his own personal illness and notified the employer. On March 22, 2017, the claimant missed work due vehicle issues and notified the employer of his absence.

The claimant is a single father with full-time custody of his children, ages 2 and 6. He does not have regular day care in place for his children and will call off work when his babysitters are not available. His children had colds on March 23, 2017 and none of the people he normally asks to watch his children were available. He notified the employer of his absence. The claimant was unable to obtain childcare on March 24, 27, 28, and 29. He notified the employer of his absences on each of the days except March 29, 2017. After March 29, 2017, the claimant attempted to contact the employer to save his job. However, when he spoke to someone in Human Resources he learned he had been discharged.

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. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a states:

“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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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 the 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 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*.

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 who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony to be more credible. The claimant provided contradictory or changing testimony in regard to multiple issues. One such example is when he was asked if he was aware of the employer's policy and he denied being aware of it. However, he then testified that he was seeking information about the new attendance policy.

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 claimant had two excused absences as they were related to his own personal illness and properly reported. The other seven absences were unexcused as they were related to issues of personal responsibility, specifically transportation and lack of childcare. The claimant was aware that his job was in jeopardy and he could lose his job for his final absence. He was aware of the new policy and tried to reach the employer to save his job. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are denied.

DECISION:

The April 20, 2017, reference 01, unemployment insurance 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn