

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSEPH LA BARBERA
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 21A-UI-08167-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/07/21
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 March 19, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he was discharged on February 10, 2021 for being excessively absent. The parties were properly notified of the hearing. A telephone hearing was held on June 14, 2021. The claimant participated. The claimant was represented by Joanie L Grife, attorney at law. The employer participated through Human Resources Manager Patty Taylor. Exhibits A, B, C, D, E and F were received.

ISSUE:

Whether the claimant's separation from the employer was disqualifying?

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 Bobcat operator from September 30, 2019, until this employment ended on January 25, 2021, when he was terminated. The claimant worked the third shift which spanned from 11:00 a.m. to 5:30 p.m. His immediate supervisor was Production Supervisor Hope Blevins.

The employer has an absenteeism policy in its employee handbook. It states an employee is supposed to call in to a hotline to report an expected absence two hours before the shift begins. The absentee policy issues the following progressive discipline with the accrual of corresponding point totals: written warning (five points), final written warning (seven points), and termination (ten points). The claimant was aware of the attendance policy because he was trained on it during orientation.

The claimant was subject to quarantine from October 1, 2020 to October 12, 2020.

The claimant asked Human Resources Generalist Henry Orias to use vacation from November 21, 2020 to November 28, 2020. Mr. Orias approved his vacation.

From November 21, 2020 to November 28, 2020, the claimant was on schedule as planned. When he returned, the claimant was instructed to talk to Ms. Blevins. The claimant told him that he would be terminated because she had not approved his vacation time. The claimant had already been approved for this vacation by Mr. Orias.

After being terminated, the claimant filed a complaint with the Union.

On January 21, 2021, the claimant returned to work due to a successful grievance with the union. As part of settling his grievance, the Human Resources Department and the Union placed him to work as a Bobcat operator in the freezer. When the claimant returned, Mr. Orias told him that he had accrued six points and he subject to an unpaid suspension.

On January 30, 2021, Mr. Orias told the claimant that he had been terminated because the plant manager did not think he was "taking his job seriously." Mr. Orias did not provide any additional specifics. The claimant did not report to work after this date because he was under the understanding he had been terminated.

During the hearing, Human Resources Representative Patty Taylor did not report to work in late-January or early-February 2021. She maintains this resulted in the claimant's termination on February 10, 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged several times from employment due to non-disqualifying 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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

Excessive absences are not considered misconduct unless unexcused. 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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) (emphasis added); 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 therefore 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.

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).

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 who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant’s version of events to be more credible than the employer’s recollection of those events.

The administrative law judge finds the claimant more credible because Ms. Taylor’s knowledge regarding the circumstances of the claimant’s termination appeared to be based on faulty records.

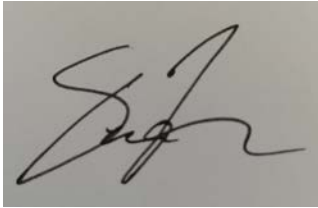
In particular, the administrative law judge finds the claimant’s contention that he was terminated on November 28, 2020 and January 30, 2021 credible. As a result, the claimant’s absence for days occurring after his termination on January 30, 2021 cannot constitute misconduct because he was not scheduled to work after that date.

The claimant’s termination on January 30, 2021 cannot constitute misconduct because Ms. Taylor did not even acknowledge this termination occurred let alone provide a specific report regarding the employer’s reason to satisfy Iowa Admin. Code r. 871-24.32(4).

The claimant’s termination on November 28, 2020 similarly cannot constitute misconduct because Ms. Taylor did not provide a specific report regarding the employer’s reason for this discharge. Furthermore, the claimant states he was approved to be away from work regarding the days he was told led to this termination. As a result, this termination cannot be construed to be misconduct. Benefits are granted.

DECISION:

The March 19, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged several times due to non-disqualifying misconduct. Benefits are granted, provided he is otherwise eligible.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
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June 28, 2021
Decision Dated and Mailed

smn/scn