IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

DENNIS J PAVLOVEC Claimant **SMI CO** Employer	**APPEAL 16A-UI-12711-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/06/16** **Claimant: Appellant (1)**

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 November 23, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. A hearing was scheduled for December 15, 2016 after proper notification, but was continued due to the claimant's non-receipt of the proposed employer exhibits. The parties were properly notified about the second hearing. A telephone hearing was held on December 27, 2016. The claimant participated personally. The employer participated through Al Hermsen, vice president. Chuck Burke, general manager, also testified. Claimant exhibit A and Employer Exhibits 1 through 7 were admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 laborer and was separated from employment on October 27, 2016, when he was discharged for excessive absenteeism and failure to return from suspension (Employer Exhibit 4).

The employer has a policy which requires its employees to call in to their plant one half hour prior to their shift to report an absence. The claimant was aware of the employer's policies. The employer does not have a set number of attendance occurrences or missed days before it will discharge.

During 2016, the claimant had no call/no shows on January 5, February 11, and 15 (Employer Exhibit 2). The claimant went on FMLA for a period of February 10 through March 10, 2016 for a personal injury (Employer Exhibit 5, 6 and 7). Upon return, he continued to call off work

including March 28, April 4, 5, 6, 7, 11,12, 25, 26, 27, 28, May 2, 3, 4, 5, 9 and 10, for a variety of reasons including car problems, attending a funeral, and various ailments (eye, foot, stomach, gout, back) (Employer Exhibit 2). He was issued a first written warning on May 10, 2016 based on his continued absences (Employer Exhibit 1). The claimant continued to report absences from work including May 11, 2016, July 13, 14, August 22, 23,31, September 19, 20, 21, 22, 26, 27, 28 and 29, October 4, 5 and 6 for reasons including illness, an apartment inspection, a oversleeping, and a family emergency. On October 6, 2016, the claimant was placed on a second leave of absence until October 14, 2016. The claimant then was absent October 17, 18, 19, and 20, reporting his leg and knee were bothering him (Employer Exhibit 2). On October 24, 2016, the claimant neither called nor showed up to work, though he believes he called in around 5:00 a.m. to report knee issues. As a result of the no call/no show, Mr. Burke informed the claimant on October 25, 2016 that he would receive a warning and serve a three day suspension, including October 24, 25 and 26 (Employer Exhibit 3).

The claimant was expected to return to work on October 27, 2016. The claimant's cousin passed away and his wake was to be held on October 27, 2016 in Lawlor, from 3:00 p.m. to 7:00 p.m. (The funeral was scheduled for October 28, 2016, which was the claimant's usual day off.) The claimant generally worked 6:00 a.m. to 4:30 p.m. and Lawlor was located approximately 20 miles away. The claimant could have worked his shift, and still attend the wake but did not, and without explanation. He acknowledged he was at home during the day, when scheduled. On October 27, 2016, the claimant reported his absence in a timely matter, and did not work, stating it was for a funeral (not a wake). He had not mentioned to Mr. Burke that his cousin passed away either on October 25, 2016 during the warning or thereafter. He was subsequently 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.

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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. Excessive absences are not considered misconduct unless unexcused. 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).

In the specific context of absenteeism the administrative code provides:

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 evidence presented is that the claimant over a period of year, had repeated absences including multiple incidents of claimant had no call/no shows on January 5, February 11, and 15 (Employer Exhibit 2). The claimant was also off work including March 28, April 4, 5, 6, 7, 11,12, 25,26, 27, 28, May 2, 3, 4, ,5, 9 and 10, for a variety of reasons including car problems, attending a funeral, and various ailments (eye, foot, stomach, gout, back) (Employer Exhibit 2). On May 10, 2016 based on his continued absences, he was issued a written warning (Employer Exhibit 1). The claimant continued to report absences from work including May 11, 2016, July 13, 14, August 22, 23, 31, September 19, 20, 21, 22, 26, 27, 28 and 29, October 4, 5, 6, 17, 18, 19, and 20 for a host of reasons including illness, an apartment inspection, a oversleeping, and a family emergency. It is true that the claimant two periods of medical leaves of absence, both from February 10 until March 10, 2016, and October 6 through 14, 2016, but that he also was absent for reasons excluding illness, whether it be for car issues, oversleeping, an apartment inspection, etc. (Employer Exhibit 2). Consequently as a result of an October 24, 2016 no call/no show, Mr. Burke informed the claimant on October 25, 2016 that he would receive a warning and serve a three day suspension, including October 24, 25 and 26 (Employer Exhibit 3). The administrative law judge is persuaded that the claimant knew or should have known his job was in jeopardy given his history of warnings.

While the administrative law judge is sympathetic to the claimant's cousin's passing, she is not persuaded that the claimant could not have worked his shift on October 27, 2016, and then attended the wake, since it was 20 miles away. The claimant offered no persuasive reason why he could not work at 6:00 a.m. until 4:30 or even part of a shift, if he wanted to be at the entire wake from 3:00 p.m. until 7:00 p.m. Rather, the claimant acknowledged he was at home during his shift on that day before the wake. Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:
The November 23, 2016 (reference 01) 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.

_____
Jennifer L. Beckman
Administrative Law Judge

_____
Decision Dated and Mailed

jlb/rvs