

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ANDREW C BRODERSON
Claimant

ASSOCIATED MATERIALS LLC
Employer

APPEAL 17A-UI-02188-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/21/16
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 February 15, 2017, (reference 03) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on March 21, 2017. The claimant participated personally. The employer participated through Marjorie Harper, Human Resources Manager. Wayne LaCouture, manager. Claimant Exhibit A and B were received into evidence. The fact-finding documents contained within the administrative record, were unavailable for the hearing. 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 maintenance technician and was separated from employment on January 23, 2017, when he was discharged for excessive absenteeism.

The employer has a no fault attendance policy, which designates a point value for infractions of the attendance policy, such as tardy or leaving early, (1/2 point), absences, (1 point) or No call/no shows (3 points.) Points are designated regardless of the reason for the absence, but a doctor's note can reduce consecutive absences related to an illness or injury. Upon 10 points in a rolling 12 month period, an employee is discharged. Employees can check the status of their points with human resources. The claimant was made aware of the employer's policy at hire, and again in June 2016. The claimant had no absences due to no call/no show. The undisputed evidence is the claimant complied with the employer's expectation of notifying the employer in advance of absences. The undisputed evidence is also that the employer attempted to work with the claimant, allowing him additional absences without consequence and in fact, not discharging him until he reached 15 points, rather than the 10 referenced in

employer policy. The claimant accumulated the following attendance points due to attendance policy infractions:

July 7, 2016	Absent due to illness	1 point
August 15, 16, 17, 2016	Absent due to illness	1 point
August 22, 2016	3 minutes tardy, due to illness	½ point
August 24, 2016	4 minutes tardy, due to illness	½ point
September 7, 2016	Absent, due to pain from car accident	1 point
September 20, 2016	Absent due to illness	1 point
September 27, 2016	Absent due to illness	1 point
October 6, 2016	41 minutes tardy, reason unknown	½ point
October 16 and 17, 2016	Absent due to illness but no documentation provided	2 points
October 25, 2016	2 minutes tardy, due to illness	½ point
October 26, 27, 28, 2016	Absent due to illness	1 point
November 10, 2016	Early out due to medication side effects	½ point
December 5, 2016	Absent due to illness	1 point
December 7, 2016	Absent due to death of dog	1 point
December 12, 2016	2 minute tardy, due to illness	½ point
December 21, 2016	1 minute tardy, due to illness	½ point
January 13, 2017	4 minute tardy, due to illness	½ point
January 16, 2017	Absent due to illness	1 point

The claimant was issued a verbal warning on August 31, 2016 for his absences and a written warning on October 14, 2016. There is disputed evidence as to whether the claimant's medical condition, specifically, depression, was attributed to personal matters or to his workplace. The undisputed evidence is the claimant made the employer aware of his medical condition, was actively seeking treatment for it throughout employment, and did not qualify for FMLA based on his tenure with the employer. The claimant's final absence on December 16, 2016, was attributed to a properly reported absence which the claimant stated was due to his medical condition. The claimant visited his psychiatrist on December 16, 2016, in conjunction with his absence. He was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not 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).

"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).

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 not 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.

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). 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). In this case, sixteen of the eighteen absences the employer considered when discharging the claimant were related to properly reported absences (or tardies) attributable to illness. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. The claimant also had one tardy for 41 minutes for unknown reasons and missed one day of work due to the death of his family dog. Therefore, the claimant had two unexcused absences and sixteen excused absences.

In addition, the final absence was due to properly reported absence related to the claimant's depression. The administrative law judge finds the claimant's assertions of having a genuine medical condition to be credible, regardless of the root of the medical condition, (personal issues versus work conditions) and in light of his visit to a psychiatrist which coincided with his final absence. Based on the evidence presented, the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because his last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The February 15, 2017, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed,

provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs