

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL A WIDSTROM
Claimant

OTISMITCH LLC
Employer

APPEAL 17A-UI-07050-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/18/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 11, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on July 28, 2017. The claimant participated and testified. The employer participated through owner Shari Mitchell. Employer's Exhibits 1 and 2 were received into evidence.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a cook from February 28, 2017, until this employment ended on June 16, 2017, when he was discharged.

Mitchell testified claimant was deemed to have voluntarily quit after he was a no-call/no-show for his shifts on June 15 and 17. According to Mitchell claimant was scheduled to work beginning at 6:00 p.m. on June 15 and 5:00 p.m. on June 17. When claimant did not show up to work, Mitchell believes a coworker sent him a message asking where he was, but did not hear back. No member of management contacted claimant. Mitchell testified the employer did not

hear back from claimant again. Claimant testified he did not come to work on June 15 because he was not aware he was scheduled to work. According to claimant he did not have further contact with the employer because, on June 16, he was contacted by his immediate supervisor, Rod Marshall, and informed he had been separated from employment.

Mitchell testified on June 8, 2017, she posted the work schedule for the week of June 11, 2017. On that schedule claimant was scheduled to work from 10:30 a.m. to 5:00 p.m. on June 13 and 14. (Exhibit 2, pg. 1). There is a notation at the bottom of the schedule that it was prepared by Mitchell on June 9, 2017. Mitchell testified either on June 8 or 9, claimant informed her that he wanted to give up the two shifts he was scheduled because he does not work mornings. Mitchell believed this conversation occurred via telephone. Mitchell then reassigned those shifts to other employees and assigned claimant shifts on June 11, 14, 15, and 17. Mitchell testified the new schedule was posted sometime prior to June 11. There is a notation on the bottom of that schedule indicating it was prepared by Mitchell on June 13, 2017. (Exhibit 2, pg. 2). When asked about the notations at the bottoms of both schedules Mitchell indicated she believed that was the date the document was printed, not the date it was actually prepared. Mitchell could not recall why she would have printed and retained a copy of the schedule on June 13, 2017. Mitchell testified she believed claimant saw a copy of the updated schedule because Marshall told her he had.

Claimant testified he came to work at 6:00 p.m. on Sunday, June 11, because he was always scheduled to work at that time on Sundays. According to claimant, when he arrived at work, his coworkers asked why he was there and informed him he was not on the schedule. Claimant testified he then went to look at the schedule and saw he was only scheduled to work from 10:30 a.m. to 5:00 p.m. on June 13 and 14. According to claimant he then went to the office to speak with Mitchell and ask why his schedule was so different than it had been. Claimant informed Mitchell he would give up the morning shifts, but testified nothing was said about his working any additional shifts that week. Claimant then worked for a few hours doing various cleaning projects. Claimant testified he also came in to work on June 12 and 14 hoping to pick up some hours and not realizing a revised schedule had been posted. According to claimant, only the original schedule was in place on June 11 and he never saw the revised schedule. Claimant testified he had no idea he had been scheduled to work later in the week until June 16 when Marshall called to inform him he had been separated from employment.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 11, 2017. The claimant filed for and received a total of \$386.00 in unemployment insurance benefits for the weeks between June 18 and July 1, 2017. The employer did not participate in the telephone fact finding interview regarding the separation on July 10, 2017, but submitted written documentation. The employer's documentation included a letter detailing the employer's position on the separation, a copy of the employer's attendance/leave policies, an attendance detail sheet, and prior disciplinary actions. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain

in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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 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 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). 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.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

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. Mitchell's testimony appeared uncertain and equivocal. Claimant on the other hand, was able to testify confidently about the dates and specifics of the events in question. The notations on the print-outs submitted by the employer, indicating the documents were prepared on June 9 and June 13 are also consistent with claimant's version of events.

Claimant failed to report to work as scheduled on June 15, but this failure was because he was unaware the schedule had changed and he was expected to be at work. The following day claimant was informed by his supervisor that he has been separated from employment. Because his absence was based on reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Furthermore, if claimant's absence on June 15 was not reasonable, this was his only unexcused absence and the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Accordingly, benefits are allowed. The issues of overpayment and participation are moot.

DECISION:

The July 11, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs