

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ASHLEY M THOMPSON
Claimant

MENARD INC
Employer

APPEAL 17A-UI-04967-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/09/17
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 May 9, 2017 (reference 03, amending reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on May 31, 2017. The claimant, Ashley M. Thompson, participated. The employer, Menard, Inc., participated through Steven Carstens, Second Assistant General Manager; and Kyle Vogel, Front End Manager. Employer's Exhibits 1 through 5 were received and admitted into the record.

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: Claimant was employed part time, most recently as a cashier, from September 29, 2015, until April 12, 2017, when she was discharged for violating the attendance policy.

Claimant's final absence occurred on April 7, 2017. Claimant was scheduled to work at 3:00 p.m. Claimant called in and reported to Jessica C. that she could not come to work, as she had a conflict with her other job. (Exhibit 2) Claimant and Vogel had a conversation previously about this additional job. Claimant testified that she went to Vogel on the Sunday prior to April 7 to inform him that she had just been hired for a second job and could no longer work Friday nights. According to claimant, Vogel asked her if this second employer knew she already had another job. He then approved her to be absent on April 7. Claimant testified she also spoke to Jessica Cox and Kaitlyn, both of whom were assistant managers, and told them that she would not be at work on Friday night. Vogel testified that claimant came to him several days prior to April 7 and reported that she had just been hired at Applebee's and had to work that Friday night. Vogel told her that he expected her to be at work, as she had been scheduled to work that same night for Menard's. Vogel testified that claimant subsequently went to the two

assistant managers to try and go over his authority and get them to approve her absence for April 7.

Claimant had several prior absences. On March 16, claimant was fourteen minutes late to work. (Exhibit 3) Claimant did not call in and report that she was going to be late. Claimant did not recall the reason for her tardiness. Claimant was absent from work on March 13, 2016. (Exhibit 4) Claimant testified that she called in and reported that she was sick that day. Claimant was absent from work on February 26, 2017. (Exhibit 5) Claimant could not recall why she was absent that day. The documentation from the employer does not reflect that claimant reported a reason for her absence. Claimant was aware that her job was in jeopardy for attendance reasons.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld.

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(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).

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 claimant provided credible testimony that she called in sick on March 13, 2017. Claimant could not recall the reasons she was late and absent on the other prior occasions, and the employer’s documentation does not reflect that she reported a reason. The administrative law judge finds the late arrival on March 16 and the absence on February 26 were not due to illness or another excused reason. Finally, the administrative law judge found Vogel more credible than claimant regarding the final absence. Vogel’s account of the events was more reasonable and believable than claimant’s account. Specifically, the administrative law judge does not believe that claimant would go to the two assistant managers to let them know that she was going to be gone if Vogel had already approved the absence.

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 employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment and the final absence was not properly reported or excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The May 9, 2017 (reference 03, amending reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn