IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ISMIR DURIC Claimant **TITAN TIRE CORPORATION** Employer	**APPEAL 17A-UI-11491-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/25/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 November 2, 2017, (reference 05) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 30, 2017. Claimant participated. Employer participated through human resources manager Michael Gerlach and human resources consultant Joyce Kain. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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

Can 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 full-time as a tire builder from July 9, 2007, and was separated from employment on October 19, 2017, when he was discharged.

The employer has an attendance policy that provides an employee will be discharged after five unexcused absences within a twelve month period. The policy also provides that an employee will receive a written warning after three unexcused absences and a suspension after four unexcused absences in a twelve month period. The employer requires employees contact the employer and report their absence at least two hours prior to the start of their shift. Claimant was aware of the employer's policy. The employer reviews an employee's absenteeism record after each absence.

The final incident occurred when claimant was absent on October 9, 2017 from his shift. Claimant properly reported his absence to the employer. Claimant told to the employer that he was going to be absent due to illness. Claimant reported his absence to the security office. The security office documented that claimant was absent due to "car trouble." Employer Exhibit 1. Claimant testified that he went to a doctor on October 9, 2017 and received a doctor's note, but he lost it before he could provide it to the employer. After claimant's absence, the employer reviewed his absenteeism record. The October 9, 2017, absence was claimant's thirteenth occurrence of unexcused absenteeism in a twelve month period. Employer Exhibit 1.

On October 17, 2017, the employer held a disciplinary hearing regarding claimant's absences. Ms. Kain testified claimant admitted during the hearing that he was absent on October 9, 2017 due to car trouble and he asked to have his absence coded as a no report. Employer Exhibit 1. Claimant denied telling the employer he was absent due to car trouble on October 9, 2017. Claimant denied asking the employer to code his absence on October 9, 2017 as a no report. The employer suspended claimant for two days to give him an opportunity to bring any supporting documents for his absences. Claimant then went back to the doctor on October 18, 2017 and obtained a doctor's note excusing him from work on October 9, 2017. Employer Exhibit 1. This doctor's note was dated October 18, 2017. Employer Exhibit 1.

On October 19, 2017, the employer met with claimant. On October 19, 2017, claimant provided the employer the doctor's note that was dated October 18, 2017. Employer Exhibit 1. Claimant again denied he was absent on October 9, 2017 due to car trouble. Claimant admitted to calling in for car trouble on an earlier absence, but denied calling in for car trouble on October 9, 2017. The employer then discharged claimant.

In October 2016, the employer gave claimant a written warning for unexcused absenteeism. Employer Exhibit 1. On January 31, 2017, the employer gave claimant a three day suspension for unexcused absenteeism. Employer Exhibit 1. Claimant was warned his job was in jeopardy. Employer Exhibit 1. The employer found claimant had unexcused absences on: October 17, 2016 (illness (no doctor's note)); October 18, 2016 (illness (no doctor's note)); October 19, 2016 (illness (no doctor's note)); January 3, 2017 (illness (no doctor's note)); January 4, 2017 (illness (no doctor's note)); January 5, 2017 (illness (no doctor's note)); January 6, 2017 (illness (no doctor's note)); January 9, 2017 (illness (no doctor's note)); January 10, 2017 (illness (no doctor's note)); January 11, 2017 (illness (no doctor's note)); January 12, 2017 (family member ill (no doctor's note)); August 30, 2017 (car trouble); and October 9, 2017. Employer Exhibit 1.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory

and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra.*

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743 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 absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant denied telling the security office on October 9, 2017, that he was going to be absent due to car trouble. Claimant testified that told the security office he was going to be absent on October 9, 2017 due to illness. Claimant's testimony was corroborated by the doctor's note he provided the employer that excused him from work on October 9, 2017. *See* Employer Exhibit 1. Although the doctor's note was dated October 18, 2017, no evidence was provided that claimant altered the doctor's note and the doctor's note excused him from work on October 9, 2017. Because claimant's last absence on October 9, 2017 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.

Furthermore, even if it were determined that claimant's final absence on October 9, 2017 was due to car trouble and not a properly reported illness, the employer still did not established that claimant had excessive absences that would be considered unexcused for purposes of unemployment insurance eligibility. The employer testified and provided evidence regarding thirteen absences that resulted in claimant's discharge from employment due to absenteeism. Eleven of those thirteen absences were due to his or his family member's illness, which are not considered unexcused. Although claimant did not provide doctor's notes for these eleven absences, medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. Therefore, only two of claimant's thirteen absences would be considered unexcused. However, two unexcused absences are not disqualifying since they does not meet the excessiveness standard. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The November 2, 2017, (reference 05) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs