IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ABDIEL PRADO Claimant **REMBRANDT ENTERPRISES INC** Employer	**APPEAL 17A-UI-09265-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/20/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the September 6, 2017 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 5, 2017. The claimant, Abdiel Prado, participated personally. CTS Language Link provided language interpretation services for claimant. The employer, Rembrandt Enterprises Inc., participated through witnesses Rudolph Harden, Charo Marcos, and Marcus Lopes.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a blender operator. He was employed from January 27, 2017 until August 15, 2017, when he was discharged. Claimant's immediate supervisor was Mr. Harden.

The employer does have a written policy in place regarding absenteeism which provides that an employee must notify their supervisor prior to being absent from a scheduled work shift. The written policy provides that a "no call no show" can be considered grounds for immediate termination. Claimant did receive a copy of the written policies during his orientation. The employer does not have a policy in place that provides that three consecutive "no call no shows" are considered to be job abandonment.

In July of 2017, claimant took a voluntary leave of absence with approval of the employer. The purpose of his leave of absence was to travel to Cuba to attend legal proceedings that involved the custody of his minor children, who remained in Cuba. Claimant learned that the legal proceedings would take longer than expected and he was absent on July 26 and July 27, 2017, which included two extra days after his approved leave of absence had expired. Claimant

notified the employer, through a third party, on July 23, 2017 that he would be absent from work on July 26 and July 27, 2017 due to this reason.

On August 8, 2017, claimant contacted his supervisor via text message and reported that he was on his way to Cuba because his grandmother had a heart attack. Claimant was scheduled to work on August 9 and August 10, 2017. Claimant did not specifically state that he would be absent on August 9 and August 10, 2017, he simply stated he could not work because he was leaving the country. Mr. Harden sent a text message back to claimant notifying him that he was unable to approve his absences and that he needed to contact the human resources department.

Claimant's grandmother passed away on August 10, 2017. Claimant returned to the United States on Sunday, August 13, 2017. Claimant was scheduled to work on Monday, August 14, 2017 but did not work. He did not work on August 14, 2017 because he believed he needed to contact human resources prior to returning to work. He made multiple attempts to contact the human resources department about his absences. Claimant made actual contact with the human resources department at approximately 4:00 p.m. on August 14, 2017 and was instructed to report to work the following date, August 15, 2017, for a meeting with that department.

Claimant reported on August 15, 2017 to meet with the human resources department. At that time claimant was told that the employer had considered him to have voluntarily quit because he had not attended work on August 9, 10, and 14, 2017. Claimant was not allowed to return to work.

Claimant did not receive any discipline during the course of his employment. Claimant did not receive any verbal or written warnings that his job was in jeopardy.

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. Benefits are allowed.

First, it must be determined whether claimant quit or was discharged from employment. A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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 that the claimant's version of events is more credible.

Specifically, the employer's witnesses testified that a three day "no call no show" policy existed when in fact it did not. Further, employer's witnesses testified that claimant's absences were in violation of the employer's policy due to the fact that claimant was already on his way to Cuba when he made the employer aware that he would not be to work the following days. However, there was no written or verbal policy requiring the claimant to report to the employer as soon as possible of his intent to be absent from work, rather, the policy only provided that the claimant notify the employer of his absence prior to his scheduled work shift. Lastly, employer's witnesses corroborated the claimant's testimony that the notifications that claimant would be absent from work occurred prior to his scheduled shift. Even in light of the claimant's prior notification that he would be absent, the employer still proceeded to assert that claimant was a "no call" on these dates. The inconsistent statements of the employer's witnesses, viewed in light of the claimant's clear and corroborated testimony, makes claimant the more credible witness.

Claimant did not have any intention to voluntarily quit his job. Claimant made attempts to contact human resources, as he was instructed to do, on Monday, August 14, 2017 throughout the day. He was told to return to work on August 15, 2017, which he did. At that time he was told that he was considered to have voluntarily quit his job due to three consecutive no call no shows. This was purportedly in violation of employer's three day "no call no show policy"; however, no such policy exists. It is clear that claimant had no intent to quit and made no overt action that would carry out any intention to quit. As such, claimant was discharged by the employer and an analysis must be made to determine whether claimant engaged in disqualifying 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. 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. *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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

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. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. 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*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case, the claimant properly reported his absences on July 26 and July 27, 2017 when the employer was notified on July 23, 2017 that he would be absent. Claimant further properly reported his August 9 and August 10, 2017 absences when he texted his supervisor on August 8, 2017 that he was going to Cuba and could not work. Claimant did not properly report his absence on August 14, 2017 after he had returned to the United States.

Even if claimant had reasonable grounds for being absent on July 26 and July 27, 2017, claimant was never warned when he returned to work that his job was in jeopardy or that further absences would lead to discharge. Mr. Harden's testimony that claimant was given a verbal warning after his return to work in July of 2017 is not credible.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an

employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

The employer has failed to establish that the claimant was warned that further absences would lead to discharge from employment. As such, the employer has failed to meet its burden of proof to establish that claimant exhibited 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. As such, benefits are allowed.

DECISION:

The September 6, 2017 (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/rvs