IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JEREMIAH C YOUNG Claimant **MOBILE TRACK SOLUTIONS LLC** Employer	**APPEAL 16R-UI-04622-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/27/15** **Claimant: Appellant (1)**

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 February 25, 2016 (reference 04) unemployment insurance decision that denied benefits based upon his discharge from employment for excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on May 4, 2016. The claimant, Jeremiah C. Young, participated personally. The employer, Mobile Track Solutions LLC, participated through Production Manager Brad Herman.

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 welder from December 8, 2015 until his employment ended on March 9, 2016. His direct supervisor was Scott Wille. Claimant had been suffering from medical issues involving his teeth and sinuses.

On February 9, 2016, claimant arrived an hour late for work due to oversleeping and was discharged from employment. Claimant had been previously warned by both his direct supervisor and the owner of the company the previous day, on February 8, 2016, that one more absence or tardy would result in his discharge from employment. Claimant had received a verbal warning regarding absenteeism on January 11, 2016 as well.

Claimant's previous absences and incidents of tardiness included the following: December 18, 2015 (claimant was one and a half hours late with no excuse given); January 4, 2016 (claimant's car went into the ditch and he also realized he had a dentist appointment so he never came in to work); January 8, 2016 (claimant was an hour late with no excuse given); January 11, 2016 (claimant called ahead of his shift beginning that he was having car problems and was five hours late); January 14, 2016 (claimant was ill and reported his absence prior to his shift beginning); January 25, 2016 (claimant was twenty-minutes late with no excuse given); January 26, 2016 (claimant had a dentist appointment and missed one and a half hours of work

but did notify his supervisor prior to missing work); January 27, 2016 (claimant missed five hours of work but properly reported this absence due to having a dentist appointment); January 28, 2016 (claimant had another dentist appointment and missed three hours of work but properly reported his absence to his supervisor); January 29, 2016 (claimant missed work all day because he had a doctor's appointment and properly notified his supervisor ahead of time); February 3, 2016 (claimant called prior to his shift to report that he could not make it to work due to the weather and snow storm); February 4, 2016 (claimant called prior to his shift to report that he could not make it to work due to the weather and snow storm); February 5, 2016 (claimant left work early due to an allergic reaction and went to the doctor that same day).

On the February 5, 2016 visit to his doctor claimant received a doctor's note advising him to not work for three consecutive days (February 8, 9, and 10, 2016). This was due to the fact that the doctor believed he may have an environmental allergy and wanted to confirm this by having claimant stop welding for those three days. He gave this doctor's note to his employer. Claimant felt better by the end of the weekend and went to work on Monday, February 8, 2016. On that date he was given a verbal warning that if he continued to be absent or tardy he would be discharged from employment.

Claimant was tardy to work on the following Tuesday, February 9, 2016. Claimant overslept because he did not hear his alarm clock. He believed this was due to his sinus infection. He contacted his supervisor to advise that he was going to be late to work due to him oversleeping. He made this telephone call prior to his shift starting. He intended to work that day but when he arrived to work on February 9, 2016 he was discharged due to his excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the claimant did not quit. Claimant was discharged from employment.

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 and (4) provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> 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).
>
> (4) Report required. The claimant's statement and the 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.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

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.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. *Milligan v. Emp't Appeal Bd.*, No. 1-383 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, we should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. 85-1418, (Iowa Ct. App. filed June 4, 1986).

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. Second, the absences must be unexcused. *Cosper,* 321 N.W.2d 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*, 350 N.W.2d at 191. It can also be unexcused because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. *Higgins*, 350 N.W.2d at 190. 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 at 10-11. 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).

First, it must be determined whether or not claimant's tardiness on February 9, 2016 was excused or unexcused. Claimant did contact his supervisor prior to his shift beginning; however, the reason for his tardiness was due to oversleeping. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Higgins*, 350 N.W.2d at 191. Claimant contends that his oversleeping was due to his medical issues; however, claimant was not ill that day as evidenced by his intention to work on February 9, 2016. Even though he was instructed by his doctor to remain home on February 8, 9, and 10, 2016, he failed to do so and intentionally disregarded his doctor's orders.

Because claimant was well enough to work, he should be required to arrive at work on time. Simply because claimant had a doctor's note, but chose to disregard it, does not mean that he can use it whenever he feels it is necessary. Claimant's actions in disregarding his doctor's instructions amount to a waiver of the benefits in his absence being excused. Waiver has been found in other cases. See *Olson v. EAB*, 460 N.W.2d 865 (Iowa App. 1990)(holding that a claimant's resignation several months after a substantial change in the contract of hire was disqualifying because the claimant was held to have acquiesced in the changes); and *Efkamp v. IDJS*, 383 N.W.2d 566 (Iowa 1986)(holding that a voluntary quit is not attributable to the employer where other wages have been reduced by a collective bargaining agreement because the right of a claimant to deal with the employer is surrendered to his agent through the collective bargaining process).

Because claimant waived his right to have his absence on February 9, 2016 be excused, because he came to work intending to work and was not ill, his final instance of tardiness was a current act of misconduct. Examining claimant's other unexcused absences or incidents of tardiness include December 18, 2015; January 4, 2016; January 8, 2016; January 11, 2016; January 25, 2016. Six absences or incidents of tardiness in less than sixty days are excessive.

The employer has established that the claimant was discharged for job-related misconduct which would disqualify him from receiving benefits. As such, benefits are denied.

DECISION:

The February 25, 2016 (reference 04) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

_____
Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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