IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MEGAN A MANARY Claimant **CIVCO MEDICAL SOLUTIONS** Employer	**APPEAL 18A-UI-01081-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/24/17** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 18, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 16, 2018. Claimant participated. Employer participated through human resources business partner Macey Greiner. The employer offered Employer Exhibit 1 into evidence. Claimant received the documents contained in Employer Exhibit 1 on February 12, 2018. Claimant objected at the hearing because some of the documents were not legible. It is noted that some of the documents in Employer Exhibit 1 are not very legible. Claimant's objection was overruled and Employer Exhibit 1 was admitted into evidence. Claimant Exhibit A was admitted into evidence with no objection.

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 full-time as a customer service specialist from September 25, 2017, and was separated from employment on December 28, 2017 when she was discharged. Claimant was paid by the employer for December 29, 2017 because she had previously scheduled a vacation for that day.

The employer has an employee handbook, but does not have a specific written attendance policy. The employee handbook does indicate that employees are expected to be at work on time. Claimant was aware of the employee handbook. Employer Exhibit 1. The employer's time system uses a plus/minus rounding system when recording an employee's work time. If an employee clocks into the system at 8:06 a.m., then the time system rounds the time down to 8:00 a.m. If an employee clocks into the system at 8:07 a.m., then the time system rounds the time up to 8:15 a.m.

The final incident occurred when claimant returned late from her lunch break on December 27, 2017. On December 27, 2017, claimant was scheduled to return from lunch at 1:15 p.m., but

she did not return to the employer until 1:22 p.m. Employees are required to clock in and out for their unpaid breaks. Claimant told her manager (Amy King) she was late returning because she was on the phone with her attorney regarding personal issues; claimant was discussing a court case with her attorney. The reason claimant was on the phone with her attorney was because she had asked for time off for a court hearing, but the employer had denied her request. Claimant was on the phone discussing the issue with her attorney. Claimant did not inform the employer prior to her lunch break that she was going to return late. Ms. King told claimant that she would have to talk to human resources because she came back late. The employer reviewed claimant's badge swipe on December 27, 2017 and confirmed she had swiped back into the building at 1:22 p.m. On December 28, 2017, Ms. King, Ms. Manary, and the director of the customer service team met with claimant. The employer informed claimant she was discharged due to excessive tardiness. The employer paid claimant for December 29, 2017, because she had a previously scheduled vacation that day. Claimant told the employer she did not think it was supportive of her current personal situation (custody battle).

On October 2, 2017, the employer gave claimant a verbal warning for five occurrences of tardiness during a two week period. Claimant did not recall receiving this verbal warning. On October 24, 2017, the employer gave claimant a written warning for continued absenteeism (October 10, 2017 (excessive lunch break); October 16, 2017 (tardy); October 18, 2017 (tardy); and October 19, 2017 (tardy)). On December 13, 2017, the employer gave claimant a final written warning for absenteeism (November 1, 2017 (tardy); November 13, 2017 (tardy); November 28, 2017 (tardy); December 4, 2017 (tardy); December 6, 2017 (tardy); and December 11, 2017 (tardy)). Claimant was warned that further incidents of absenteeism may result in discharge. Claimant's tardies were due to personal issues. Claimant testified if she was late, it was only a minute or two late and it was due to getting into the building. The employer used its badge system (when an employee swipes into the building) to determine if claimant was tardy.

REASONING AND CONCLUSIONS OF LAW:

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

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 exhibits that were admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant'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:
>
> 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 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 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).

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 v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

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. Claimant's argument that during her employment she may have been late to work, but it was only for a couple of minutes and should not be considered misconduct is not persuasive. The employer presented substantial and credible evidence that claimant was late returning from lunch on December 27, 2017 after having been warned about her absenteeism. Although the administrative law judge is sympathetic to the reason for claimant's late return, she did not notify the employer she was going to be late, she did not have prior approval to be late on December 27, 2017, she clearly returned to the employer over six minutes after she was supposed to be back from lunch, and the reason for her late return was due to a personal issue.

Even though claimant provided her "Timesheet Report" for this hearing in Claimant Exhibit A, Ms. Greiner credibly testified that the employer's time system rounds the time an employee clocks in. Ms. Greiner further testified that the employer used the badge system to determine when claimant actually swiped into the building to determine if she was tardy.

The employer has established that claimant was warned on December 13, 2017, that further incidents of unexcused absenteeism could result in termination of employment and her final incident of absenteeism on December 27, 2017 was not excused. Claimant's final incident of absenteeism, in combination with her history of unexcused absenteeism, is considered excessive. Benefits are denied.

DECISION:

The January 18, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/rvs