

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOHN A BALLANTINE
Claimant

HOA HOTELS LLC
Employer

APPEAL 17A-UI-10803-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/24/17
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 October 13, 2017, (reference 01) unemployment insurance decision that denied benefits. On November 6, 2017, the claimant requested a postponement and it was granted by Administrative Law Judge Bennett. On November 7, 2017, the case was transferred to Administrative Law Judge Beckman, who granted a request for postponement by the employer. The parties were properly notified about the hearing. A telephone hearing was held on November 28, 2017. The claimant participated personally. The employer participated through Cathy Rebeck, chief operating executive. Claimant Exhibit A was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a night auditor and was separated from employment on August 28, 2017, when he was discharged for absenteeism.

The employer had a written policy which required employees to notify the employer by phone at least two hours in advance of a shift they were unable to report. The employee was also expected to find coverage for a shift missed. At an August 3, 2017 meeting, which the claimant attended, the employer clarified that text message was not acceptable for reporting an absence and employees were expected to personally call management unless physically unable.

The claimant was tardy for his shift, when he called Ms. Rebeck on August 8, 2017, to report he did not have transportation. Ms. Rebeck personally drove the claimant to his shift, and stated to him that it was a one-time occurrence and a verbal warning would be documented in his file for

the incident. The claimant last performed work on August 21, 2017. On August 22, 2017, the claimant text messaged Ms. Rebeck at 10:41 p.m. for his 11:00 p.m. shift, stating he was throwing up blood and would not be in. The claimant stated he had been sick all day and thinks he went to Mercy West that day. Ms. Rebeck responded via text message that it was unacceptable, the claimant should have notified her sooner, and that there would be a warning documented in his file. She also requested a doctor's note to cover the absence. No warning was ever physically administered because the claimant did not return to work. The claimant responded that he received the text message. On August 23, 2017, the claimant text messaged Ms. Rebeck at 6:39 p.m. that he was "still sick". The claimant texted Ms. Rebeck on August 25, 2017 at 10:06 p.m. before his 11:00 p.m. shift that he was unable to work and would update her over the weekend. No employee coverage was arranged for any of his absences. The claimant did not check in with Ms. Rebeck as he stated he would. On August 28, 2017, after the employer had not heard from the claimant over the weekend, it moved forward with discharge by way of a voicemail to the claimant. Weeks thereafter, the claimant was eventually hospitalized with pneumonia.

The claimant asserted he believed his discharge was related to an incident that occurred in July 2017, involving a housekeeper sending graphic photos to his cell phone, and him sharing the photos. The employer initiated a meeting with the claimant on July 14, 2017 because of the claimant's reports of sharing the photos and rumors. The claimant was directed to delete the photos, which he did not, and stated he was comfortable working with the housekeeper. The claimant stated he later reported the incident to the corporate office and believed he was fired in response. The employer denied the photo incident contributing to the decision to discharge him.

REASONING AND CONCLUSIONS OF LAW:

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

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(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).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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). (Emphasis added).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) ("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The administrative law judge is persuaded the claimant was aware of the employer's policies which required he call, not text message, the employer at least two hours prior to his 11:00 p.m. shift start time, and whenever possible, coordinate coverage for absences. Prior to discharge, the claimant received a verbal warning on August 8, 2017 and notification of a written warning on August 22, 2017.

In this case, the claimant text messaged the employer to report his absences related to illness on August 22, 23, 24, and 25, 2017. The employer held a meeting on August 3, 2017, and told employees including the claimant, that text messages were not accepted to report absences. Even if the claimant's reporting of absences by text message instead of phone call were accepted as valid call-offs, he did not provide sufficient notice under the employer's notification policy for his absences on August 22 and 25, 2017. 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. Therefore those two absences, even though for illness, would be considered unexcused. The claimant's tardy on August 8, 2017 would also be considered unexcused since transportation is the claimant's responsibility. The administrative law judge concludes the claimant's absences for August 8, 22, and 25 were unexcused. At most, the claimant had two excused absences on August 23 and 24, 2017 when he text messaged over two hours in advance of his shift, that he would not be at work due to illness.

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. *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. In this case, the claimant had three unexcused absences in a month (August 8, 22, and 25, 2017) when he failed to properly report his absences. This is clearly excessive.

The administrative law judge is not persuaded the claimant was discharged for an incident involving graphic photographs of a housekeeper as he asserted. Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The October 13, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment due to 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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn