

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CORY A BYRD
Claimant

OSCEOLA FOOD LLC
Employer

APPEAL 17A-UI-04657-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/26/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 27, 2017 (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant voluntarily quit work on March 22, 2017, by failing to report to work for three days in a row and not notifying the employer of the reason. The parties were properly notified of the hearing. A telephone hearing was held on May 24, 2017. The claimant, Cory A. Byrd, participated and was represented by Katrina M. Phillip, Attorney at Law. The employer, Osceola Food, L.L.C., participated through Roberto Luna, HR Manager; Ben Green, Supervisor; and Dan Zielke, HR Coordinator; and Chris Hunter of Employers Unity represented the employer. Employer's Exhibits 1 through 6 were received and admitted into the record over objection.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a production employee in Curing, from March 10, 2008, until March 22, 2017, when he was discharged. Claimant last reported to work on March 15, 2017. The parties agree that claimant spoke to his supervisor, Ben Green, that day about taking vacation time from March 20, 2017, through the end of the month. Claimant testified that he saw Green write down the vacation time in the book in the office where employees' vacation time is documented. Claimant also testified that Green verbally approved him to take vacation from March 20 through March 31. Green made contradictory statements regarding whether he noted claimant's request in the book. Green denies that he told claimant this request was approved.

Claimant called in sick on March 16 and 17. He spoke with the security guard at the front desk to report that he would not be at work. Claimant had followed this procedure in the past. Claimant had no contact with Green on March 16 or 17. Green testified that he was concerned

that claimant would assume his request for vacation time had been approved. Green also testified that he assumed claimant would be at work on March 20. He made no effort to contact claimant while claimant was absent on March 16 and 17, as it was not his responsibility to initiate contact with an employee about a vacation request. Additionally, Green made no effort to contact claimant regarding the vacation request once claimant did not come to work on March 20, 2017.

Claimant reached out to the employer on Friday, March 31, after he did not receive his paycheck for the week of March 20 through 24. Claimant spoke with Zielke, who told him that he had been taken off the payroll. Zielke testified he notified claimant that he had been removed because of job abandonment. Claimant reported to Zielke that he had been on vacation and that his vacation request was approved by Green. Zielke encouraged claimant to come in and speak with Luna. Following this conversation, Zielke reported the information to Luna. Claimant testified that he tried to contact Luna, but Luna was not available. Luna testified that the employer does not contact any employee who is discharged for job abandonment, and so no one made an effort to reach out to claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

- (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The determination in this case rests in significant part on the credibility of the parties. 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 the claimant provided credible testimony regarding the end of his employment. Green gave numerous inconsistent statements during his testimony, and the administrative law judge did not find him credible. In contrast, the claimant provided a consistent and reasonable narrative, and the actions that he took appear in line with the events as he experienced them. As the administrative law judge found claimant credible and finds no evidence that claimant intended to quit his employment, this case will be analyzed as a discharge from employment and the employer bears the burden to establish disqualifying 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(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).

Excessive absences are not considered misconduct unless unexcused. 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.*, 734 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 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 credible evidence presented during the hearing shows that claimant was told that his request to take two weeks of vacation was approved. Claimant saw Green note the vacation time on the book in the office, and he was not given any indication that his request was still under review or was not permitted. The employer cannot tell an employee that his requested vacation is approved, change its mind without communicating to the employee, and then discharge the employee for taking unapproved time off. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

DECISION:

The April 27, 2017 (reference 02) unemployment insurance decision is reversed. Claimant did not quit but 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/rvs