

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

PAIGE N EDDY
Claimant

SHELTERED WORK INC
Employer

APPEAL 17A-UI-07689-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/25/17
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 July 20, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 15, 2017. The claimant participated personally. Carly Schmelzer, attended as an observer. The employer participated through Beverly Fredrick, executive director. Peggy Piper and Steve Lieberherr also testified for the employer. 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 program instructor and was separated from employment on June 19, 2017, when she was excused for excessive tardiness and absenteeism.

Until June 12, 2017, the employer had a flex start time between 8:00 and 8:30 a.m. to allow employees to arrive before clients. The claimant asserted she believed the start time was extended to 9:00 a.m. and consequently was tardy (after 8:30 a.m.) on January 18, February 7, 8, 15, March 1, 7, 8, 9, 10, 22, April 7, 11 and 19, 2017. The claimant was tardy to her March 31, 2017 shift, arriving at 1:00 p.m. for a 9:00 a.m. shift, due to a sick child. She overslept and was tardy on April 4, 2017, arriving at 10:15 a.m. for her 9:00 a.m. shift. When the claimant did not call in or report for her shift on June 6, 2017, the employer called the claimant repeatedly to no avail, before Ms. Piper went to the claimant's house to check on her. The claimant did not answer but called Ms. Piper back, stating she had overslept.

The employer acknowledged it was aware the claimant was involved in personal matters related to her family and tried to be understanding and supportive. The claimant's start time was modified to 11:30 a.m. to allow the claimant to handle personal matters and to ensure she would arrive on time. If claimant was late after 11:30 a.m. it could affect the passing of medications to the individuals served by the employer, as not all employees were qualified to pass medications. On June 13, 2017, the claimant arrived to work at 11:47 a.m. because she was in traffic after going to her bank. The claimant waited until after her start time to notify the employer of her tardy. She also left early that day to go visit her attorney.

The final incident occurred on June 15, 2017, when the claimant was late to work due to taking a long shower. The claimant notified her employer at 11:15 a.m. that she would be tardy to her shift. She arrived between 11:37 a.m. and 11:45 a.m. and was subsequently discharged.

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).

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 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).

The administrative law judge is persuaded the claimant was aware of the employer’s policies which required her to be at work by 8:30 a.m. before June 12, 2017, and by 11:30 a.m. after June 12, 2017. Prior to discharge, she received written warnings related to her attendance on June 7, 2017, April 4, 2017, October 4, 2016 and July 26, 2016. Based on the prior warnings, the claimant knew or should have known her job was in jeopardy, as the employer attempted to accommodate the claimant to ensure its business needs were met but that she could preserve employment in light of any struggles in her personal life.

In 2017, the claimant was tardy to work on January 18, February 7, 8 15, March 1, 7, 8, 9, 10, 22, April 7, 11 and 19, 2017 for unknown reasons. The claimant was then tardy on March 31, 2017 due to a sick child, arriving at 1:00 p.m. for her 9:00 a.m. start time. She was also tardy on April 4, 2017, arriving at 10:15 a.m. for a 9:00 shift due to oversleeping. The claimant did not call or show to her shift on June 6, 2017, resulting in the employer sending Ms. Piper to check on the claimant after she was non-responsive to phone calls. The claimant then called Ms. Piper to report she had overslept. The employer had delayed the claimant's start time to 11:30 a.m. to help her arrive on time, and to allow her to address personal affairs. The claimant was late to her shift on June 13, 2017, notifying the employer after her start time, due to being in traffic after going to the bank. The claimant arrived at 11:47 a.m. to her shift on June 14, 2017 and then left early to meet with her attorney.

On June 15, 2017, the claimant notified the employer at approximately 11:15 a.m. that she would be late to her shift because of a long shower. The claimant arrived between 11:37 and 11:45 a.m. to her shift and was subsequently discharged. Even if the claimant's position that she only had to be at work by 9:00 a.m. was accepted, the claimant still had six attendance infractions between March 2017 and her discharge on June 19, 2017. Based on the reasons for each of the absences (regardless of proper notification), they would not be considered excused absences, including the final tardy on June 15, 2017 when the claimant was late due to a "long shower."

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 at least six unexcused absences in less than a seven month period, and in light of prior warnings. This is clearly excessive.

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 July 20, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn