

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**STEPHEN SHINER**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 19A-UI-09809-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/10/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the December 5, 2019 (reference 01) unemployment insurance decision that found the claimant was not eligible for unemployment insurance benefits due to his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on January 9, 2020. The claimant, Stephen Shiner, participated personally. Laura Lunsford participated as a witness for the claimant. The employer, Hy-Vee Inc., was represented by Lisa Harroff and participated through witnesses Aaron Barwick and Alex Sevedge. Employer's Exhibits 1 through 3 were admitted.

**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 part-time as a kitchen clerk. His employment began on April 19, 2019 and ended on November 14, 2019, when he was discharged. Claimant's last day physically working on the job was November 9, 2019. His working hours varied as a part-time employee and he did not have a regular scheduled shift that he worked. His job duties included cooking, stocking and customer service. Claimant's immediate supervisor was Alex Sevedge.

The employer has an employee handbook that the claimant received a copy of. See Exhibit 3. The employer's attendance policy in the handbook states that an employee must contact their store director or a supervisor as early as possible prior to the start of their shift if they are going to be late or cannot come to work. See Exhibit 3. The policy further provides that if you are unable to work for more than one day, daily contact is required unless approved by your store director or supervisor. See Exhibit 3. The handbook does not state that an employee can be discharged for a specific number of absences. See Exhibit 3. The handbook does not distinguish whether an absence is considered excused or unexcused. See Exhibit 3. There is no amount of absences listed that would be considered excessive or poor attendance by the employer. See Exhibit 3.

Claimant was absent from work on November 3, 2019; November 10, 2019; and November 11, 2019. He was absent from work for personal reasons on each occasion. Claimant informed Mr. Sevedge that he would be absent from work on November 3, 2019 via text message on November 2, 2019. See Exhibit 2. On November 9, 2019, claimant told Mr. Sevedge that he would not be in to work on November 10, 2019 and November 11, 2019. The only reason claimant was discharged from work was for poor attendance. Claimant did not receive any verbal or written discipline prior to his discharge.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and 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.

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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment.” *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp’t Appeal Bd.*, 743 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. *Id.* at 558.

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); 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 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). 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 or because it was not “properly reported.” *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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 (Iowa 1984). 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 N.W.2d at 10-11 (Iowa 1982). 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.*

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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 that the claimant's testimony that he notified Mr. Sevedge about his absences on November 3, 10, and 11, 2019 is credible.

In this case, the employer's written policies states that an employee must only notify the employer of their absence. No "good cause" reason or excuse for the absence is required under the policy. The employer's written policy does not state what amount of absences from work are considered excessive or "poor attendance". The claimant was never warned, verbally or in writing, that his absences could lead to his discharge, even though he notified his employer of them. He was a part-time employee and his work scheduled varied so he did not have a regular scheduled shift that he typically worked.

Because the employer had not previously warned claimant about his attendance violations leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Claimant was a part-time employee and was only required to notify the employer of his absences. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice or should be given. The employer's written policies do not put the claimant on notice that three absences, ones in which he notified the employer about beforehand, would lead to his discharge. Further, he was not provided any discipline regarding his attendance that would put him on notice that his job was in jeopardy for violation of the employer's procedures or expectations regarding attendance.

As such, the employer has failed to establish any intentional and substantial disregard of the employer's standards of behavior or interests which rises to the level of willful misconduct. As such, benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The December 5, 2019 (reference 01) unemployment insurance decision denying benefits is reversed. Claimant 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.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/scn