

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PIERRE DOUGLAS
Claimant

AUTOZONERS LLC
Employer

APPEAL 17A-UI-12423-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/05/17
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 21, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on December 21, 2017. Claimant participated. Employer participated through district manager Kelly Tyler. The employer offered Employer Exhibit 1 into evidence. Claimant objected to Employer Exhibit 1 because he did not understand it. Claimant's objection was overruled and Employer Exhibit 1 was admitted into evidence. Official notice was taken of the administrative record, including claimant's benefit payment history and claimant's wage history, with no objection.

ISSUE:

Is the appeal timely?

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: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on November 21, 2017. Claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by December 1, 2017. The appeal was not filed until December 4, 2017, which is after the date noticed on the unemployment insurance decision. On December 4, 2017, claimant called Iowa Workforce Development (IWD) because he had not received any paperwork. The IWD employee told claimant that he had missed a phone interview. Claimant was not aware of a phone interview because he had not received any paperwork. The employee told claimant that a decision had been made and he was not eligible for benefits. The employee gave claimant instructions on how to file an appeal.

Claimant was employed as a part-time sales employee from February 5, 2017, and was separated from employment on October 19, 2017, when he was discharged. Claimant was discharged due to excessive absenteeism.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies; however, a doctor's note will excuse attendance infractions. Employer Exhibit 1. The policy also provides that an employee will be warned as points are accumulated and will be discharged upon receiving twelve points in a rolling twelve month period. Employer Exhibit 1. The employer requires employees contact the employer and report their absence at least one hour prior to the start of their shift. Employer Exhibit 1. Claimant was aware of the employer's policy. Employer Exhibit 1.

The final incident occurred when claimant was tardy on October 19, 2017 to his shift. Employer Exhibit 1. Claimant had been scheduled to work at 2:30 p.m. on October 19, 2017, but he did not clock in until 2:54 p.m. If claimant switches a shift with another employee, claimant is responsible for ensuring someone actually works his shift. Claimant received one attendance point for being late on October 19, 2017, which gave him a total of 16.5 attendance points. Employer Exhibit 1. On October 19, 2017, the employer told claimant he was discharged.

On July 7, 2017, claimant received a written warning dated May 4, 2017 for his attendance infractions. Employer Exhibit 1. On September 1, 2017, the employer met with claimant regarding a serious violation regarding his attendance infractions, but claimant did not acknowledge or refuse to acknowledge the warning. Employer Exhibit 1. During claimant's employment, he was tardy on: March 23, 2017 (long lunch, one point); April 7, 2017 (tardy, one point); April 10, 2017 (tardy, .5 points); April 24, 2017 (tardy, .5 points); April 25, 2017 (tardy, .5 points); May 4, 2017 (tardy, .5 points); May 6, 2017 (tardy, one point); June 4, 2017 (tardy, one point); June 24, 2017 (tardy, two points); June 29, 2017 (tardy, .5 point); August 1, 2017 (tardy, one point); September 17, 2017 (tardy, two points); and October 19, 2017 (tardy, one point). Employer Exhibit 1.

The administrative record reflects that claimant does not have other full- or part-time employment in the base period and has not requalified for benefits.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce

evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the fact-finder's decision because he did not receive the decision. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). On December 4, 2017, claimant called on Iowa Workforce Development (IWD) because he had not received any paperwork and was informed that he had been disqualified from receiving benefits. Claimant timely appealed the overpayment decision, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. 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 exhibit that was admitted. 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.

Iowa Code section 96.5(12) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

12. *Supplemental part-time employment.* If the department finds that an individual is disqualified for benefits under subsection 1 or 2 based on the nature of the individual's separation from supplemental part-time employment, all wages paid by the supplemental part-time employer to that individual in any quarter which are chargeable following a disqualifying separation under subsection 1 or 2 shall not be considered wages credited to the individual until such time as the individual meets the conditions of requalification as provided for in this chapter, or until the period of disqualification provided for in this chapter has elapsed.

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).

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). Although the employer assessed attendance points for claimant's absences on June 21, 2017 and October 18, 2017, these absences were related to properly reported illnesses and are considered excused. The employer also assessed attendance points to claimant for being late on March 12, 2017; however, the employer's Attendance Report shows claimant was not late, but was early on March 12, 2017. Employer Exhibit 1. Therefore, this tardy is also considered excused.

Claimant's final incident of absenteeism occurred when he was twenty-four minutes late for his scheduled shift on October 19, 2017. Claimant was aware he was scheduled to work on October 19, 2017 and his argument that he had given that shift to another employee is not persuasive. Even if claimant had agreed to have another employee work his shift on October 19, 2017, he was responsible for making sure that someone worked that shift.

Even though claimant's attendance infractions on March 12, 2017, June 21, 2017, and October 18, 2017 are considered excused, from March 23, 2017 through October 19, 2017, claimant was tardy thirteen times. Thirteen tardies in an eight month period is considered excessive. Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. 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).

The employer has established that claimant was warned that further unexcused absences could result in termination of employment and his final tardy on October 19, 2017 was not excused. Claimant's final tardy, in combination with his history of unexcused absenteeism, is considered excessive. Benefits are denied.

DECISION:

The November 21, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant's appeal is considered timely. 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 his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs