IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID J MARKELL Claimant **HENNIGES AUTOMOTIVE IOWA INC** Employer	**APPEAL 16A-UI-12287-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/27/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the November 9, 2016 (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 2, 2016. The claimant, David J. Markell, participated personally. The employer, Henniges Automotive Iowa Inc., did not participate.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a general laborer. He was employed from May 11, 2015 until October 22, 2016. Claimant's immediate supervisor was Cody Mueller. Claimant's normal shift was 11:00 p.m. to 7:12 a.m. each Sunday through Thursday.

The employer does have a written policy in place regarding absenteeism which provides that points are given to employees for absences. This is a no fault policy, meaning that points are accumulated even if the employee is absent due to illness or other reasonable grounds. The claimant was discharged for absenteeism. Claimant was made aware of the policy when he received copy of the policy. Claimant received a verbal warning and then a suspension which led to claimant's immediate termination.

Claimant incurred points due to absences for medical appointments. On Friday, October 14, 2016 claimant worked his full shift and then was told at the end of his shift that he was required to work overtime. Claimant was the only person in his family who had a driver's license and vehicle to transport his nieces and nephews to school in the mornings. His sister's vehicle had become inoperable for approximately one week due to mechanical issues.

Claimant notified his employer that he could not work overtime on Friday, October 14, 2016 due to the fact he had to transport the minor children to school on Friday morning immediately following his normal shift. He was assessed points for his absence on this date.

Claimant was notified on Friday, October 14, 2016 that he had to work overtime again on Monday, October 17, 2016. This would again conflict with his ability to transport the children to school on Monday morning. Claimant was absent on Monday, October 17, 2016 because he was responsible for transporting the children to school, which conflicted with his new work schedule.

Claimant left his shift early on Tuesday, October 18, 2016 in order to avoid the person from human resources giving him a suspension and then eventual termination. Once the employer suspends an employee they are then immediately terminated after the suspension unless they qualify for a last chance agreement. Claimant was aware that he did not qualify for a last chance agreement and was trying to avoid being discharged.

He returned to work as scheduled on October 19, 2016 and was told that he was suspended for three days and to return on Saturday, October 22, 2016. Claimant did return on Saturday, October 22, 2016 and was told at that time that he was discharged from employment based upon points accumulated.

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.

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) (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*, 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*.

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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case the claimant properly reported that he was unable to work overtime on Friday, October 14, 2016 due to the fact he was the only person in his family with a driver's license and vehicle to transport his nieces and nephews to school. The employer assessed him points for him failing to work overtime. Claimant was absent on Monday, October 17, 2016 because he was scheduled to work a shift that again conflicted with him being able to transport the minor children to school, even when the employer was notified of this conflict on Friday, October 17, 2016. These two absences are for reasonable grounds and were properly reported to the employer; as such, they are excused for unemployment insurance benefits analysis.

Claimant left early on Tuesday, October 18, 2016 in order to avoid being suspended. Once the employer suspends an employee they are then immediately terminated after the suspension unless they qualify for a last chance agreement. Claimant was aware that he did not qualify for a last chance agreement and was trying to avoid being discharged. Leaving early to avoid discipline is not a good cause reason for an absence and as such, claimant's absence on this date is unexcused. Claimant admitted that he did have absences due to medical appointments prior to October of 2016 but there was no testimony or evidence provided as to what dates the employer found claimant's previous absences to be unexcused. Because there was no evidence provided regarding other absences, the administrative law judge can only examine evidence presented at the time of the hearing. As such, in this case, there was one absence that was unexcused, October 18, 2016. One unexcused absence is not excessive.

The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The November 9, 2016 (reference 03) 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 R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

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