IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DUSTIN V SMITH Claimant **HICKLIN DOOR SERVICES** Employer	**APPEAL 22A-UI-04380-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/02/22** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Hicklin Door Services, filed an appeal from the February 4, 2022, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion he was not discharged for a current act of employment. A telephone hearing was held on March 21, 2022 at 9:00 a.m. The employer participated through Owner Tim Hicklin. Prior to the end of the employer's testimony, the claimant appeared. Due to time constraints expressed by Mr. Hicklin and the claimant, the administrative law judge postponed the hearing.

The hearing was rescheduled to occur on April 7, 2022 at 11:00 a.m. The claimant participated and testified. The employer participated through Tim Hicklin and Human Resources Director Sofia Williams.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

Whether the claimant is required to repay the benefits he has received after his separation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as an installation technician from September 20, 2021, and was separated from employment on January 3, 2022, when he was terminated. The claimant's immediate supervisor was General Manager Jake Falke.

The employer has an employee handbook containing an attendance policy. It states an employee is supposed to inform their supervisor as soon as possible that they are not going to be arriving for a scheduled shift. The attendance policy leaves to the employer's discretion

whether an employee's attendance is excessive. The claimant acknowledged receipt of the employee handbook on September 24, 2021.

On November 5, 2021, the claimant informed the employer he was experiencing financial troubles and he was worried about not being able to pay for housing. The employer awarded the claimant an advancement on his salary of $2,500.00. The claimant received a contract asking him to keep this agreement confidential. Over the following days, Service Manager Greg Simmons overheard the claimant saying that he had received an advancement on his wages.

On November 9, 2021, the employer received a phone call from another motorist alleging the claimant was driving his work vehicle erratically. The claimant was driving the vehicle at speeds approaching 80 miles per hour, which made the trailer swing.

On November 16, 2021, the claimant informed the employer that his brother-in-law, who was living with him, had tested positive for Covid19. Mr. Falke told the claimant that he should quarantine due to this positive exposure.

On November 21, 2021, the employer asked the claimant if he was able to work. The claimant said he had not been experiencing symptoms of Covid19. The claimant was encouraged to get a Covid19 test, so that he could return to work.

On November 22, 2021, the claimant said he received a negative test result. The claimant did not provide a doctor's note or verification of the result.

On November 24, 2021, the claimant informed the employer that his girlfriend was sick. The claimant was instructed to remain in quarantine.

On November 25, 2021, the claimant reported to the employer that his girlfriend tested positive for Covid19.

On November 29, 2021, the employer asked when the claimant would come back to work. The claimant was also told that he needed to provide a Covid19 test displaying a negative test result to return.

On November 30, 2021, the claimant provided the employer with a Covid19 test showing inconclusive results. The claimant had no symptoms of Covid19. The employer let the claimant come back to work that day.

On December 3, 2021, the claimant sent a text message to Mr. Falke informing him that he could not make it to work on December 4, 2021. The claimant informed him that his mother was in the hospital due to a Covid19 infection. The claimant also tried to call Mr. Falke that day. Mr. Falke did not respond to these text messages because he was on vacation. The claimant spoke with Bill (last name unknown) who assured him that his shift had been covered. The claimant offered to come in on December 5, 2021. Bill replied that would not be necessary.

On December 9, 2021, the claimant was working with Robert Herman on an assignment installing garage door openers. Mr. Herman instructed the claimant to remove the old garage door openers to be scrapped. The claimant removed these old garage door openers and threw them away. This resulted in a loss of $700.00 in equipment that could have been recouped for the employer.

On December 17, 2021, the claimant let the employer know at noon that he planned on leaving at 3:45 p.m. rather than at 5:00 p.m. to attend a father and daughter dance. The claimant was authorized to leave early that day.

On December 23, 2021, the claimant was forty-one minutes late for his shift beginning at 7:00 a.m. The claimant provided no justification for being late that day. Mr. Hicklin and Mr. Falke performed the claimant's performance review later that day. Mr. Hicklin and Mr. Falke expressed their dissatisfaction in the claimant's ability to be at work and his attendance. The claimant agreed to take a raise of $0.50 per hour rather than a $1.00 raise. Mr. Hicklin explained that all employees are entitled to a raise after 90 days.

The claimant last worked at the employer on December 27, 2021. Mr. Hicklin authorized the claimant to take four days of paid time off going into the end of the year.

At 8:53 a.m. on January 3, 2022, the claimant sent a text message to Mr. Falke stating he overslept. The claimant said it would not happen again. Since the claimant had been scheduled to work with Robert Herman, his coworkers did not report for work until 8:15 a.m. that day rather than at 7:00 a.m.

On January 3, 2022, Mr. Falke made the decision to terminate the claimant. The employer did not make Mr. Falke available on either hearing date. Mr. Hicklin initially testified Mr. Falke terminated the claimant for a culmination of all of the specific incidents listed above combined with the following vague descriptions of bad behavior. For instance, Mr. Hicklin also noted that Service Manager Greg Simmons observed the claimant on his cell phone for personal reasons, while he was on the clock. Mr. Hicklin also noted the claimant was observed driving in his work vehicle for personal use. Mr. Hicklin did not give specific incidents for these categories of misconduct.

When the administrative law judge asked if the attendance incidents were enough, Mr. Hicklin said that Mr. Falke would not have discharged the claimant if there had not been the other incidents. Mr. Hicklin then backtracked in his testimony observing that Mr. Falke had authority to hire and fire. Mr. Hicklin then said Mr. Falke could have terminated the claimant based on the amount of work he had missed.

The following section describes the findings of fact necessary to resolve the overpayment issue:

The claimant filed for and received his full weekly benefit amount of $327.00 for 12 weeks from the week ending January 8, 2022 to the week ending April 16, 2022 for a total of $3,924.00.

The administrative record KFFD shows a notice of factfinding was mailed to the parties on January 19, 2022 for a factfinding interview occurring on January 25, 2022 at 8:50 a.m. The employer did not participate because it did not receive the notice of factfinding until January 26, 2022.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due non-disqualifying conduct. The overpayment issue is moot because the claimant is entitled to benefits.

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).

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*.

The findings of fact show how the administrative law judge has resolved the disputed factual issues in this case. I have carefully weighed the credibility of the witnesses and reliability of the evidence. I attribute more weight to the claimant's version of events. The employer did not provide first hand or even second hand testimony supporting Mr. Falke's reason for discharge. In addition, the employer did not provide documentary evidence suggesting the claimant's attendance issues were such that he on notice that his job was in jeopardy if he had further attendance incidents.

Iowa Admin. Code r. 871-24.32(4), (7) and (8) 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.
>
> (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.
>
> (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.

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 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).

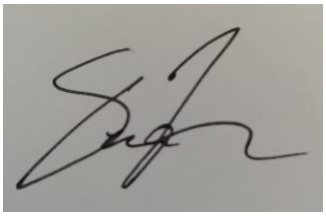
The administrative law judge finds the employer has failed to meet its burden in Iowa Admin. Code r. 871-24.32(4). Mr. Hicklin could not articulate specifically what led Mr. Falke to

terminate the claimant at either hearing. This is important because the employer must also show the claimant was discharged for a current act Iowa Admin. Code r. 871-24.32(8). As Iowa Admin. Code r. 871-24.32(8) instructs, past acts and warnings can only be used to judge the magnitude of the current act leading to discharge. To the extent the employer cannot say what ultimately motivated Mr. Falke's decision, it has failed to meet these requirements. Benefits are denied.

Assuming arguendo that Mr. Falke terminated the claimant for attendance, the administrative law judge finds the claimant's attendance as insufficiently excessive after removing days in which he was on quarantine or otherwise authorized to be off of work. After excluding these attendance dates as instructed by Iowa Admin. Code r. 871-24.32 (7), the claimant had two tardy incidents over a 100 day period of employment. This is insufficiently excessive to be disqualifying, especially given that the claimant had not been placed on notice that additional incidents would lead to termination. Benefits are granted. The overpayment issue is moot because the claimant is entitled to benefits.

DECISION:

The February 4, 2022, (reference 01) unemployment insurance decision is affirmed. The employer has not met its burden to show the claimant was discharged for disqualifying misconduct. Benefits are granted, provided the claimant is otherwise eligible. The overpayment issue is moot because the claimant is entitled to benefits.



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April 29, 2022
Decision Dated and Mailed

smn/mh