IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TRACI J RAMER Claimant **CBE COMPANIES INC** Employer	**APPEAL 17A-UI-09611-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/13/17** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 15, 2017, (reference 04) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 5, 2017. The claimant participated personally. The employer participated through Jason Ranschau, operations manager. Employer witnesses also included Mary Phillips, chief human resources officer, Tempest Nelson, human resources specialist, and Robert Lamos, operations supervisor. Employer Exhibits One through Eleven were received 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.

ISSUES:

Is the claimant able to work and available for work?
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 first-party collector and was separated from employment on August 14, 2017, when she was discharged

The employer has a written policy which states that if an employee accumulates three written warnings in a six month period, they will be discharged (Employer Exhibit 8). The employer also has a written attendance policy which states in part that employees must call into the attendance line and speak to management within thirty minutes of their shift start time (Employer Exhibit 6) and failure to follow employer attendance policies will result in disciplinary points. The employer designates a point value to various attendance infractions including taking time without adequate paid time off to cover the time missed ("dock time"), for failure to clock in

and out as scheduled, for taking long breaks or lunches, and for unplanned absences and tardies. The claimant was given 32 hours of unpaid personal time to apply to absences, and the employer allowed one absence per month for medical/illness, without discipline. The claimant was made aware of the employer's policies upon hire and throughout her employment, including when she was issued disciplinary action for her absenteeism.

The claimant was absent for part or all of her shift on March 9, 13, 29, 30 and 31, 2017 and used her personal time towards these absences. She accumulated attendance points for missing some or all of her shifts on March 16, April 10, May 1, 20, 23, 30, June 5, 8, August 5, 10, 11, and 12, 2017. She received additional points related to failure to clock in or out, or taking long lunches/breaks on April 3, 17, 28, May 1, 4, 22, 23, 26, June 1, 3, 8, 14, 16, 17, 19, 21, 29, and July 1, 2017. She was on a personal leave of absence and did not accrue attendance points between July 1 through 20, 2017. The claimant had the ability to check her point balance during employment.

On May 8, and June 9 2017, the claimant received verbal coaching for accrual of attendance points related to extended lunches and “dock time” (Employer Exhibit 1-2). The claimant received her first written warning, related to attendance, on June 13, 2017 (Employer Exhibit 3). The claimant received her second written warning, also related to attendance, on July 25, 2017 (Employer Exhibit 4). The claimant’s third written warning, resulting in discharge was on August 14, 2017, in response to the claimant’s failure to report to work on August 12, 2017 (Employer Exhibit 5).

The final incident occurred on August 12, 2017, when the undisputed evidence is the claimant was a no call/no show. According to employer policy, a no call/no show will result in an automatic written warning. The claimant properly reported her absence on August 10, 2017, due to illness. The claimant again properly reported her absence on August 11, 2017, for illness and was informed she needed to speak to human resources based on her attendance history. The claimant called Ms. Nelson and Ms. Nelson left a voicemail for the claimant on August 11, 2017. The claimant stated she fell asleep, missed the call and did not call back because she assumed human resources had left for the day. She did not call human resources or the employer attendance line on August 12, 2017, and was a no call/no show for her shift. She was subsequently discharged.

The claimant attributed her absences to a host of personal health issues related to her pacemaker, making calls to doctors, scheduling appointments, her heartburn and surgery on esophagus, which was performed in July 2017. The claimant also acknowledged she had missed some work to help her mother. She had no explanation for the failure to clock in and out repeatedly.

Since separation with CBE Companies Inc., the claimant has been searching for full-time employment in the Waterloo/Cedar Falls area. She has been applying for positions in customer service and cashiering, which is consistent with her prior experience. She has a ten pound weight lifting restriction in place from a treating physician but can otherwise perform work, including those in the positions for which she has been applying.

REASONINGS AND CONCLUSIONS OF LAW:

The first issue is whether the claimant is able to and available for work under Iowa law.

Iowa Code § 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

For an individual to be eligible to receive benefits, he must be able to work, available for work, and actively seeking work as required by the unemployment insurance law. Iowa Code Section 96.4-3. The claimant has the burden to show he is able to work, available for work, and earnestly and actively seeking work. The unemployment insurance rules require that an individual be physically and mentally able to work in some full time gainful employment, not necessarily in the individual's customary occupation, but a job which is engaged in by others as a means of livelihood. 871 IAC 24.22(1). The claimant is seeking full-time employment, has valid transportation and searching for employment in the Waterloo/Cedar Falls area. In this case, the claimant has a ten pound lifting restriction, but is otherwise able to perform work in customer service and cashier positions, which is current with her job search and experience. The claimant has established she is able to and available for work.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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(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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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).

The administrative law judge is persuaded the claimant was aware of the employer's policies which stated that three written warnings in a six month period will result in discharge. A no-call/no-show under employer policies resulted in an automatic written warning. In addition, employees were expected to properly report absences by way of the attendance line in advance of a shift, as well as adhere to attendance policies, which require an employee to clock in and out, to not exceed allotted lunch breaks and to be at work when scheduled.

The claimant had approximately 30 instances of not clocking in/out, taking long breaks, missing work without adequate time off to cover, and being absent, between March 16, 2017 and August 12, 2017. This does not include a three week period between July 1 through 20, 2017, when the claimant was on a leave of absence. The reasons for the claimant's absences included making appointments during her scheduled work time, illness, caring for mother and having no explanation for several of the attendance infractions. Consequently, the claimant was issued verbal coaching on May 8, and June 9 2017, and two written warnings on June 13, 2017 and July 25, 2017. The claimant knew or should have known her job was in jeopardy based on the employer policies and documented discipline.

The claimant was a no-call/no-show on August 12, 2017 when she was absent due to illness but did not report her absence to the employer. 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). (Emphasis added). The claimant did not offer persuasive evidence to mitigate her failure to report the absence, as she had previously reported absences in accordance with policy on August 10 and 11, 2017. The claimant was not incapacitated in a way that made her physically unable to call in. Therefore, the claimant's final absence was not properly reported and cannot be considered an excused absence in the context of unemployment insurance benefits eligibility. 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, (as evidenced by two prior written warnings and two verbal coaching's) is considered excessive. The employer has met its burden to prove the claimant was discharged for misconduct. Benefits are withheld.

DECISION:

The September 15, 2017, (reference 04) decision is affirmed. The claimant is able to and available for work. 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.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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