

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**RAMI T SWADI**  
Claimant

**APPEAL 17A-UI-07658-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BURKE MARKETING CORPORATION**  
Employer

**OC: 07/02/17  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the July 24, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 17, 2017. Claimant participated. Attorney Samuel Aden participated on claimant's behalf. CTS Language Link interpreter ID number 5133 interpreted on claimant's behalf. Employer participated through human resources manager Shelli Seibert. Employer Exhibits 1 and 2 were admitted into evidence with no objection.

**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 full-time as a pack room laborer from January 23, 2017, and was separated from employment on July 5, 2017, when he was discharged. Claimant was discharged due to excessive absenteeism. Employer Exhibit 2.

The employer has a written attendance policy which provides employees with six personal days when they are hired. Employer Exhibit 1. Personal days are removed for unexcused absences and sick days. Employer Exhibit 1. The employer's attendance policy is a no fault attendance policy. Employer Exhibit 1. The policy also provides that an employee will be warned as personal days are removed, and will be discharged for "[a]ny occurrence after [their sixth] Personal Day[.]" Employer Exhibit 1. The employer requires employees contact the employer (their supervisor or the front desk) and report their absence at least three hours prior to the start of their shift. Employer Exhibit 1. Claimant was given paperwork during orientation with phone numbers to contact if he was going to be absent. If an employee calls in and reports they are going to be absent due to illness, the employer then codes the reason as sick on the employee's attendance record. Claimant was aware of the employer's policy. Employer Exhibit 1.

The final incident occurred when claimant was absent from his scheduled shift on June 26, 2017. Employer Exhibit 2. Claimant properly reported his absence to the employer, but he did not report to the employer he was going to be absent because he was sick. Employer Exhibit 2. Claimant testified he tried to call his supervisor, but his supervisor did not answer. Claimant did not leave a voicemail on his supervisor's phone. Claimant testified he told a coworker to tell his supervisor he would be absent because his foot was hurting. Ms. Seibert testified that if claimant had called off work because his foot hurt, the employer would have coded his absence as sick. Claimant's June 26, 2017 absence was not coded as sick. Employer Exhibit 2. Claimant's June 26, 2017 absence put him over the six allowed personal days. Employer Exhibit 2.

Ms. Seibert testified that according to the nurse's notes, claimant met with the employer's nurse when he returned to work on June 27, 2017. Ms. Seibert testified the nurse's notes reflect that claimant told the nurse that he was fine and had no pain. Claimant testified he did not tell the nurse he had no pain. On July 5, 2017, the employer informed claimant he was discharged. Employer Exhibit 2.

Claimant was last warned on June 13, 2017, regarding his unexcused absenteeism. Employer Exhibit 2. The employer warned claimant that his job was in jeopardy due to his absenteeism. Claimant was also issued written warnings for his attendance infractions on May 16, 2017 and March 14, 2017. Employer Exhibit 2.

Claimant's attendance report reflects that he was absent because he was sick on: March 25, 2017 and May 11, 2017. Employer Exhibit 2. Claimant was tardy or left early on: April 12, 2017, April 26, 2017, and May 3, 2017. Employer Exhibit 2. Claimant was absent, not related to sickness, on: March 9, 2017, April 28, 2017, June 5, 2017, and June 26, 2017. Employer Exhibit 2.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 exhibits that were 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.

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).

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 v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Claimant's final absence occurred on June 26, 2017. Claimant's argument that his final absence was due to his foot hurting and he told his coworker to tell his supervisor is not persuasive. Claimant did not report his absence and the reason directly to his supervisor or the front desk as he had been instructed. Claimant also did not leave a voicemail for his supervisor reporting the reason for his absence. Claimant testified he told his coworker to tell his supervisor he was going to be absent because his foot hurt. However, Ms. Seibert testified that claimant only reported he would not be at work. Ms. Seibert credibly testified that if claimant had reported he was absent due to his foot hurting, the employer would have coded his

absence as sick. Ms. Seibert's testimony is corroborated by claimant's attendance report. Employer Exhibit 2. Claimant's attendance report shows that on June 26, 2017, his absence was not coded as sick. Employer Exhibit 2. It is noted that claimant had reported previous absences due to sickness and they were coded on his attendance record as sick. Employer Exhibit 2. Ms. Seibert's testimony was further corroborated by the nurse's notes (claimant told the nurse he was not in pain) from the nurse's meeting with claimant on June 27, 2017. Thus, claimant's final absence on June 26, 2017 was not excused.

The employer has established that claimant was warned that further unexcused absences could result in termination of employment and his final absence on June 26, 2017 was not excused. The final absence, in combination with claimant's history of unexcused absenteeism, is considered excessive. Benefits are denied.

**DECISION:**

The July 24, 2017, (reference 01) unemployment insurance decision is affirmed. 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.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs