

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DEONDRA M WALRUP
Claimant

APPEAL 17R-UI-01136-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRAFT HEINZ FOODS COMPANY
Employer

**OC: 11/06/16
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 1, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. A first hearing was scheduled between the parties on December 30, 2016. The claimant/appellant failed to appear at the first hearing, and the appeal was dismissed. Upon a remand decision from the Employment Appeal Board, the appellant's request to reopen the hearing was granted. The parties were properly notified about the second hearing. A telephone hearing was held on March 1, 2017. The claimant participated personally. The employer did not register a phone number with the Appeals Bureau and did not participate. 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.

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: The claimant was employed full-time in production as a laborer and was separated from employment on November 9, 2016, when he was discharged.

The claimant was aware of the employer's attendance policy, which is a no-fault, points policy. For each attendance infraction, employees accrue a point value and upon fourteen points, an employee can be discharged. The claimant was aware the employer had a no call/no show policy which stated an employee is deemed to have voluntarily quit the employment if he no call/no shows for three consecutive shifts. The claimant also was aware that he must call the attendance hotline contained on his ID badge prior to his shift, in order to properly report an absence. Prior to discharge, the claimant acknowledged he received a verbal warning from his supervisor, Tyler, when he received eight points. The claimant denied any written or final warning prior to discharge.

The claimant last performed work on November 4, 2016. He then called in his absences per the employer policy, two non-consecutive days, between November 4 and 9, 2016. The claimant called off due to child custody issues that required him to attend hearings at the child support office. The claimant was then contacted by his co-worker, Corey, who said the employer was talking about him being discharged for three days of consecutive no call/no show. The employer by way of Barb, confirmed the same to the claimant in a phone call and suggested he come in and be walked out formally by the union steward. He declined and denied the three days of no call/no show. The claimant denied having three consecutive absences or any no call/no shows.

The employer did not attend the hearing or present any written statement in lieu of participation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. 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). 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 specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) ("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). In this case, the claimant acknowledged he had received eight attendance points prior to discharge. The employer's policy allows fourteen attendance points. The claimant further stated he did properly report his two absences between November 4 and 9, 2016, which were attributed to child custody/child support matters. The credible evidence presented does not establish that the claimant had three no call/no shows, which was the reason he was provided for his discharge.

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 witness 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 not 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.

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.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

In this case, the employer did not attend the hearing and did not furnish any written statement in lieu of participation. In contrast, the claimant offered credible, first-hand testimony. The claimant denied that he had three no call/no shows. The employer has the burden of proof to establish misconduct in a discharge situation, the employer did not rebut the claimant's denial. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The final incident occurred when the claimant called off two times in his final week of employment due to child custody issues. No evidence was presented that the claimant would have pointed out due to the absences. Therefore, based on the evidence presented, the employer has not established a final or current incident of unexcused absenteeism occurred which constitutes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The December 1, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs