IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JANEEN A HOLLENBECK Claimant **MENARD INC** Employer	**APPEAL 16A-UI-11719-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/13/16** **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 October 25, 2016, (reference 03) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on November 14, 2016. The claimant participated personally. The employer participated through Paul Hammell, attorney at law. Michael Wendt and Tim Messenger also testified for the employer. Employer exhibits one through nine and claimant exhibit A were received into evidence. 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 part-time as a cashier beginning May 3, 2016 and was separated from employment on October 5, 2016, when she was discharged for excessive absenteeism (Employer exhibit four).

The employer has an attendance policy which designates point values to attendance infractions. Upon receiving ten points in a rolling 90-day period, an employee is subject to discharge (Employer exhibits one and three). The claimant was made aware of the employer's policies when hired (Employer exhibit one).

Prior to discharge, the claimant had attendance infractions on July 6 and July 9, 2016 due to medical issues related to her diabetes. She also had other absences which were deemed excused by the employer due to circumstances, including her having medical documentation to support the absences (Employer exhibit nine.) Those absences were not considered when

making the decision to discharge her. She was issued warnings on June 20, 2016 (Employer exhibits one and nine), July 11, 2016 (Employer exhibit seven and eight) and was issued a three-day suspension on July 11, 2016 (Employer exhibit six) in response to ongoing attendance infractions.

The final incident occurred on October 1, 2016, when the claimant's car was broken and the bus did not pick her up as scheduled. The claimant had learned of her car issues prior to her shift and a neighbor had offered to help fix her car. When it did not work, she attempted to coordinate bus service, but it was unsuccessful. The claimant properly reported the absence to the employer. When she reported the absence, the claimant recalls Mr. Messenger telling the claimant that there was adequate coverage on her shifts and not to worry. The claimant also asserted that Mr. Messenger told her she would not receive any points for the absence. Mr. Messenger denied making any promise to the claimant but stated that he often assured employees there were enough people to cashier so they would not be upset or worry. The next day, the claimant attended a work meeting by way of ride by a neighbor. The claimant again attempted to make bus arrangements for her October 3, 2016 shift, and again was not picked up, thereby causing the claimant to timely call out. The claimant did not try to switch shifts or arrange for her neighbor to transport her. The claimant insisted she again received assurance from Mr. Messenger that she would not penalized for the absence, and which he also denied. She was subsequently discharged for exceeding the permissible number of attendance points.

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:

> **871—24.32 Discharge for misconduct.**
> **24.32(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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

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 failed to meet 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.

In the specific context of absenteeism, the administrative code provides:

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).

Unexcused: In this case, the claimant had four absences that were attributed to her discharge. To determine whether these absences leading to discharge would constitute misconduct, the absences must be analyzed and categorized as "excused" versus "unexcused" based on Iowa law (rather than an employer's policy definition.) The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds", *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not "properly

reported". *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982) (excused absences are those "with appropriate notice"). The court has found unexcused issues of personal responsibility such as "personal problems or predicaments other than sickness or injury. Those include oversleeping, delays caused by tardy babysitters, car trouble, and no excuse." *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984) *see Spragg v. Becker-Underwood, Inc.* 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

In this case, the employer's policy requires an employee to notify management to properly report an absence (Employer exhibits one and three). The claimant was aware of the employer's policy (Employer exhibit one). The administrative law judge would note that the credible evidence presented does not support the claimant assertions that she was assured that she would not receive attendance points for her absences on October 1 and 3, 2016. Rather, Mr. Messenger credibly testified that employees including the claimant are often reassured that shifts are covered so they do not worry about their peers suffering from being short-handed but that no guarantees of point removal were offered to the claimant. The credible evidence presented establishes the claimant had the following absences: July 6 and 9, 2016 due to medical issues/diabetes, October 1 due to transportation/car issues and a final absence on October 3, 2016 due to lack of transportation. There was no evidence that the absences were not properly reported.

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. Accordingly, the claimant's absences on July 6 and 9, 2016 when she reported absent for complications related to her diabetes, would be considered excused for unemployment insurance purposes. The claimant then had two consecutive absences related to her transportation issues. The administrative law judge is not persuaded that the October 1, 2016 absence when the bus did not arrive would constitute an unexcused absence inasmuch as the claimant made a good faith effort to obtain valid transportation though the bus system, and by no fault of her own, it did not arrive timely. The administrative law judge is persuaded that this absence could be considered excused because it was properly reported and for "reasonable grounds." *Higgins v. IDJS*, 350 N.W.2d 187. However, once the claimant was put on notice that the bus transportation (on October 1) was not reliable, that she had the ability to make other arrangements to ensure she did not miss work again due to bus complications. The administrative law judge is persuaded the claimant could have made alternative arrangements or requested an adjustment in her shift, especially after the bus reportedly did not pick her up for her shift on October 1, 2016. For example, the claimant indicated her neighbor took her to the employer on October 2, 2016, and may have been a resource for shifts on October 3, 2016. For these reasons, the claimant's absence on October 3, 2016 would be considered unexcused.

Excessiveness: Having identified the unexcused absences, including the final one, the next step is to determine whether the unexcused absences would be "excessive." The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.

The law provides:
Past acts of misconduct. While past acts and warning 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.871 IAC

24.32(8); *see Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v.EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). In this case, the Claimant had one unexcused absence on October 3, 2016.

Iowa courts have held that a single unexcused absence (due to car trouble) does not constitute excessive unexcused absenteeism, even when a claimant disregarded employer's instructions to call back with further information. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The last incident, which brought about the discharge, fails to constitute misconduct because the claimant's excessive absenteeism was otherwise excused. Cognizant that the employer must prove that the absenteeism was both unexcused and excessive, the claimant in this case had one unexcused absence. Generally it takes two to three unexcused absences to qualify as excessive. Here, only the last absence was unexcused, as the claimant failed to secure reliable transportation on October 3, 2016. One unexcused absence is not excessive absenteeism. Therefore, based on the evidence presented, the administrative law judge concludes that while the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. 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 October 25, 2016, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, 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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