

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANTHONY A ANDERSON
Claimant

HCSG CENTRAL LLC
Employer

APPEAL 17A-UI-05555-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/30/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the May 19, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer did not establish he was discharged for disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on June 12, 2017. The claimant, Anthony A. Anderson, participated. Present with claimant was Jennifer Storjohann, who was sworn in and gave brief testimony. The employer, HCSG Central, L.L.C., participated through Lois Fry, Dietary Supervisor; and Paul Brennenman, District Manager. Employer's Exhibit 1 was received and admitted into the record. The administrative law judge received additional exhibits from the employer, but the claimant had not yet received these and the exhibits were not admitted. The administrative law judge took official notice of the administrative record and the fact-finding documentation.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time, most recently as a cook/dietary aide, from February 1, 2017, until May 4, 2017, when he was discharged for absenteeism. Claimant last reported to work on April 26, 2017. Claimant came to work before his scheduled shift on April 27, 2017, and he had a meeting with Fry and the facility administrator. Claimant testified that he had been having issues with harassment and conflict with at least one coworker. During this meeting, Fry mentioned she planned to hold an employee meeting the following Thursday, May 4, 2017. Following the April 27 meeting and before claimant's 5:00pm shift began, claimant sent Fry a

text message asking to be removed from the schedule until his issue with harassment and coworker conflict had been resolved. Claimant testified that Fry responded, "K. Thank you for letting me know." Claimant did not report back to work after this. Claimant testified he had previously reported absences via text message and was never warned not to do this.

The employer testified that claimant was a no-call/no-show for the following shifts: April 27 at 5:00 p.m.; April 29 at 1:30 p.m.; April 30 at 1:30 p.m.; May 2 at 6:30 a.m.; May 3 at 6:30 a.m.; and May 4 at 6:30 a.m. Fry testified that she called claimant on April 28, May 2, and May 3, and claimant did not answer any of these telephone calls. Claimant testified that Fry left him a message on May 2 inquiring about his well-being, but she did not mention work, request a call back, or tell him that his employment was in any jeopardy. Fry testified that she believes she asked claimant to return her call. Claimant was discharged via letter on May 4, 2017, for missing five consecutive shifts. (Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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."

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant credibly testified regarding the circumstances leading to the end of his employment. The administrative law judge believes claimant's testimony that he sought and received approval for a brief leave of absence until the May 4 meeting occurred and his concerns were resolved.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility or that claimant engaged in disqualifying misconduct. Claimant's final absences were reported when he requested a brief respite from employment on April 27, and he received approval for this leave

of absence from Fry. The employer never notified claimant that his employment was in jeopardy, and claimant was not given any reasonable opportunity to respond to Fry before he was discharged. Accordingly, benefits are allowed. As claimant's separation is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The May 19, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn