IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BERNIE WELLS Claimant **VERMEER MANUFACTURING COMPANY INC** Employer	**APPEAL 21A-UI-05445-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/12/20** **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 February 9, 2021, (reference 03) unemployment insurance decision that denied benefits based upon excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on May 5, 2021. The claimant participated. The employer participated through Team Solutions Lead Partner Ashley Johnson and Human Resources Partner Jill Anderson. The administrative law judge took official notice of the agency records. Exhibits 1, 2, 3, 4, 5, 6, A, B and C were admitted into the record.

ISSUE:

Whether the claimant's separation from employment was disqualifying?

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 material handler from June 17, 2019, until this employment ended on September 1, 2020, when he was terminated. The claimant worked the third shift which went from 9:30 p.m. to 5:45 a.m. Sunday night through Thursday night. On Fridays, he would work overtime from 9:45 p.m. to 5:45 a.m. His direct supervisor was Production Area Manager Mike Lange.

The employer provided a copy of its attendance policy. The attendance policy defines an attendance occurrence as an absence that is not reported to a manager prior to the start of the employee's shift. The employer's witnesses stated any absence over three days must be supported by documentation. This requirement is not referenced in the employer's attendance policy. It merely states absences related to "medical leaves will be reviewed accordingly." The attendance policy states an employee will receive a verbal warning after two attendance occurrences in a six month timeframe. An employee will receive a written disciplinary action with an additional occurrence. An additional occurrence results in a final written warning. Any

attendance occurrence after the final warning results in the employee's termination. (Exhibit 6) On June 13, 2020, the claimant electronically acknowledged receipt of the employer's employee handbook. The employer provided a copy of a spreadsheet showing the dates the claimant electronically acknowledged receipt. (Exhibit 5)

Beginning in March 2020, the claimant became very sick with a respiratory illness. The claimant provided visit notes with Dr. Ryan Laughlin from an appointment on April 29, 2020. The visit notes state that he may return to work when he is fever free for 72 hours. The visit notes do not state when the symptoms started. (Exhibit C)

In June 2020, the claimant continued to experience these symptoms such as a sore throat, a cough, shortness of breath and a runny nose. The last day he physically worked on the job was on June 2, 2020. The claimant attempted to report to work given these symptoms and an Occupational Health Department nurse, Lisa (last name unknown) and Mr. Lange sent him home to be tested for Covid19. The claimant underwent four Covid19 tests in the month of June and all of them gave negative test results.

During the hearing, Human Resources Business Partner Ashley Johnson and Human Resources Partner Jill Anderson stated the claimant had been released by Dr. Laughlin to return to work without restriction on June 30, 2020. The employer did not provide a copy of the claimant's release to return to work without restriction. The claimant stated he had not been released to return to work on that date. Instead, Dr. Laughlin stated he could not issue any more doctors' excuses per Center for Disease Control regulations and he referred the claimant to a specialist in Des Moines. The claimant stated if he reported to work, then he would be sent home by the employer's Occupational Health Department under its Covid19 protocols.

On August 10, 2020, the claimant received a verbal warning for unexcused absences occurring from July 26, 2020 to July 30, 2020 and on August 2, 2020. The verbal warning stated that this put him over the limit of two occurrences in a six month period. The employer provided a copy of the verbal warning issued to the claimant. (Exhibit 3)

On August 17, 2020, the employer issued the claimant a written warning for attendance. On the written warning, Mr. Lange stated the claimant had accrued unexcused absences from August 3, 2020 to August 6, 2020, August 9, 2020 through August 13, 2020, and on August 16, 2020 and August 17, 2020. The employer provided a copy of the written warning issued to the claimant. (Exhibit 2)

On August 21, 2020, the employer issued the claimant a final written warning for attendance. On the final written warning, Mr. Lange stated the claimant was receiving the final written warning for unexcused absences he accrued on August 18, 2020, August 19, 2020, August 20, 2020 and August 21, 2020. (Exhibit 4)

On August 24, 2020, he claimant and Human Resources Business Partner Nick Rohner had a conversation regarding what documents the claimant had to return to work. Mr. Rohner gave the claimant until August 28, 2020 to provide documentation excusing him for absences he accrued on June 30 to August 27, 2020, as well as doctors excuses for absences he would accrue going forward. On the phone call, the claimant expressed frustration that he felt the employer had changed what documentation needed to be provided. Mr. Rohner admitted that he told the claimant that he only needed proof of the doctor's appointment, but the employer's Occupational Health Department told him it was insufficient. Mr. Rohner said he felt like three days would be sufficient to get the additional documentation. The claimant also stated he had been sick the whole time he had been away and said if he attempted to go to work he would be immediately

sent home if he had symptoms such as coughing or a fever. Mr. Rohner acknowledged the claimant was correct. The claimant provided a recording of this phone call with Mr. Rohner. (Exhibit A)

On September 1, 2020, Mr. Lange issued a termination notice to the claimant. The termination notice stated the claimant received a verbal attendance warning on August 10, 2020, a written attendance warning on August 17, 2020, and a final attendance warning on August 21, 2020. The employer provided a copy of the claimant's termination notice. (Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying 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(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.

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." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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).

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.

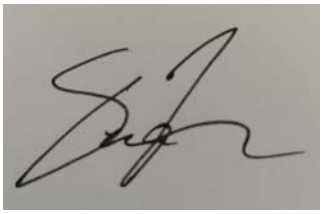
The parties acknowledge the claimant was ill and was in communication with agents of the employer about his reason for not reporting to work. As a result, the claimant's attendance incidents are excused according to the rationale above because he did not have control over his illness.

In response, the employer's witnesses contend the claimant was released to return to work effective June 30, 2020. The employer's witnesses also paradoxically state he would not be able to return with symptoms, which they do not disbelieve the claimant still had. They did not provide a copy of this release to return to work. The claimant contends Dr. Laughlin could no longer issue him excuses due to CDC regulations. The employer's witnesses contend it gave the claimant ample time to get documentation in order to cover absences occurring after June 30, 2020. The administrative law judge recognizes the claimant was away from work for an extended period of time. However, the claimant was caught between two policies, the

employer's Covid19 protocol which prevented him from reporting to work while he was still experiencing symptoms and the employer's attendance policy. The phone call on August 24, 2020 also underscores that the claimant attempted to provide documentation to the employer as requested, but was unable to do so due to confusion created by Mr. Rohner's explanation. Mr. Rohner admitted as much on the phone call. Given this record, the employer has failed to meet its burden that the claimant's absences constituted disqualifying work-related misconduct. The claimant attempted in good faith to comply with the employer's request. Benefits are granted.

DECISION:

The February 9, 2021, (reference 03) unemployment insurance decision is reversed. The claimant was discharged due to non-disqualifying conduct. Benefits are granted, provided he is otherwise eligible.



Sean M. Nelson
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May 26, 2021
Decision Dated and Mailed

smn/scn