

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AARON D JENKINS
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL 21A-UI-07803-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/23/20
Claimant: Appellant (1)

Iowa Code §96.5(2)a – Discharge for Misconduct
Iowa Code §96.5(1) – Voluntary Quit
Iowa Code § 17A.12(3) – Default Decision
Iowa Admin. Code r. 871-26.14(7) – Dismissal of Appeal on Default

STATEMENT OF THE CASE:

Aaron D Jenkins, the claimant/appellant, filed an appeal from the March 2, 2021, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 26, 2021. Mr. Jenkins participated and testified. The employer participated through Monica Dyar, human resources supervisor. Official notice was taken of the administrative record. Employer's Exhibit 1 was admitted into evidence.

ISSUE:

Was Mr. Jenkins discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Jenkins began working for the employer on June 4, 2012. He worked as a full-time document material handler. The employer terminated his employment on December 14, 2020.

The employer's policy provides that employee accrue attendance points as follows: 1 point for a full day absence or for working less than four hours, 0.5 points for being late or leaving early, and 3 points for a No-Call/No-Show. A No-Call/No-Show is defined as either not attending work for a full shift and not calling or calling in more than two hours after the start of the shift. Employee's points are active for a rolling 12-month period. Employees are required to either call Human Resources or the Security Guard if they will be absent or late.

If an employee gets 3-4.5 points, the employee and the employee's manager have a first attendance discussion. If an employee gets 5-6.5 points, the employee and the employee's manager have a second attendance discussion. If an employee gets 7-7.5 points, the employee and the employee's manager have a third attendance discussion. If an employee gets 8 or more points, the employee's manager and human resources management terminate the employee's employment. Essentially, the employer has an attendance discussion with an

employee when the employee “moves up a level.” Employers Exhibit 1. Mr. Jenkins acknowledged receiving the policy on June 4, 2012 and on April 4, 2013.

Mr. Jenkins had a first attendance discussion on March 18, 2020 for getting points on April 4, 8, 16, 2019, August 26, 2019 and March 2, 2020. At that time, he had 4.5 points.

Due to the rolling 12-month period, Mr. Jenkins had 1 point as of June 1, 2020. Mr. Jenkins called in for a personal day on June 15, he was late to work on August 10, he called in for a personal day on November 7, he called in sick on November 25, and he was late to work on December 3. As of December 3, Mr. Jenkins had 5 points. Mr. Jenkins was on intermittent Family Medical Leave Act (FMLA) leave for several years for his health conditions. Mr. Jenkins did not tell the employer that he would be using FMLA leave for the days he called in sick, when he was late or when he took a personal day. Mr. Jenkins assumed that when he called in sick or called in for personal days that he was using FMLA leave. The employer did not have a first attendance discussion with Mr. Jenkins when he reached 3-4.5 points and the employer did not have a second attendance discussion with him when he reached 5 points.

On December 11, Mr. Jenkins was scheduled to work at 6:00 a.m. Mr. Jenkins did not attend work and he did not call in. At 6:30 a.m. on December 11, Mr. Jenkins’ supervisor called him to ask him to come to work because the employer needed workers that day. Mr. Jenkins told his manager that he could not attend work because of a domestic violence situation and because his child was missing. Mr. Jenkins had told the employer a few months earlier that he was having problems in his marriage. Mr. Jenkins assumed that the employer understood that he meant he would not be at work for the next several days. Mr. Jenkins accrued 3 points for a No-Call/No-Show that day. At that point, Mr. Jenkins had 8 points.

Mr. Jenkins was scheduled to work on December 14 at 6:00 a.m. Mr. Jenkins did not attend work and he called in at 8:41 a.m., more than two hours after his shift began. Mr. Jenkins told the employer that he needed to stay home with his children due to the domestic violence situation. Mr. Jenkins accrued 3 points for a No-Call/No-Show that day. At that point, Mr. Jenkins had 11 points. Later that day, the employer called Mr. Jenkins and told him that his employment was terminated for violating the employer attendance policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Mr. Jenkins was discharged due to job-related misconduct.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *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. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Excessive absenteeism has been found when there have 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.*, 364 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

The findings of fact show how the administrative law has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience.

In this case, Mr. Jenkins' March 2 and November 25, absences were for reasonable grounds – illness – and he properly reported these absences. Therefore, these are excused absences.

Mr. Jenkins did not properly report his December 11 or December 14 absences. On December 11, Mr. Jenkins did not call-in, his manager called him 30 minutes after his shift began. On December 14, Mr. Jenkins called in more than two hours after his shift began. The administrative law judge understands Mr. Jenkins making the choice to stay home and protect his children and not attend work given the domestic violence situation. However, Mr. Jenkins was required to, and he did not, call in to let the employer know that he would not be attending work on December 11 and December 14 less than two hours before his shift began. Mr. Jenkins' December 11 and December 14 absences were unexcused.

Mr. Jenkins' June 15 and November 7 absences and him being late August 10 and December were also unexcused since they were not for reasonable grounds. Four unexcused absences and two incidents of tardiness in six months is excessive. Benefits are denied.

Even though Mr. Jenkins is not eligible for regular unemployment insurance benefits under state law, he may be eligible for federally funded unemployment insurance benefits under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"), Public Law 116-136. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (PUA) that in general provides up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive up to the \$600 weekly benefit amount (WBA) under the Federal Pandemic Unemployment Compensation (FPUC) program if he or she is eligible for such compensation for the week claimed.

DECISION:

The March 2, 2021, (reference 02) unemployment insurance decision is affirmed. Mr. Jenkins was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Daniel Zeno
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

June 8, 2021
Decision Dated and Mailed

dz/scn

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- If you do not qualify for regular unemployment insurance benefits under state law and you were or you are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA) benefits. **You must apply for PUA benefits to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>.
- **If you do not apply for and are not approved for PUA, you may be required to repay the benefits you've received so far.**
- Governor Reynolds announced that Iowa will end its participation in federal pandemic-related unemployment benefit programs, including the PUA program, effective June 12, 2021. **However, you can still apply for PUA benefits at the link above.**