

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DARREN J COX
Claimant

PRESTAGE FOODS OF IOWA LLC
Employer

APPEAL 21R-UI-06169-S2-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/24/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 3, 2020, (reference 01) unemployment insurance decision that denied benefits based upon excessive unexcused absenteeism. Pursuant to EAB remand order (which did not vacate the earlier ALJ's decision denying benefits) due notice was issued and a telephone conference hearing was held on May 4, 2021. Claimant Darren Cox participated. Employer Prestage Foods of Iowa, LLC participated through benefits and compensation supervisor Carol McClurg. Because the EAB did not vacate the original appeal decision 20A-UI-13088-S2-T, that hearing record, including any exhibits, is adopted and incorporated herein. No additional exhibits were offered.

ISSUES:

Is the claimant's appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Claimant was employed full-time as a production team member from April 23, 2019, until August 30, 2019, when he was terminated.

Employer maintains an attendance policy that states termination will occur if an employee earns ten attendance points. Missing more than 51% of a shift earns an employee one point; if an employee misses less than half of a shift they will earn a half point. Claimant was aware of the policy.

In July 2019, claimant received a verbal counseling and was provided with a copy of the attendance policy for reaching seven points. Claimant's points were reset to zero on August 4, 2019. He was absent on August 6 (illness), 7 (illness), 9 (illness), 13 (illness), 14 (illness), 15 (illness), 16 (illness), 19 (illness), and 20, 2019 (no call/no show). Claimant properly reported each absence except for the August 20 absence. Claimant received points for leaving left his

shift early without supervisor permission on August 8, 12, 21, and 23, 2019; however, claimant did not leave his shift early unless he was released by his supervisor to do so.

On August 26, 2019, claimant received a final written warning. Claimant received ½ point for leaving work early on August 29, 2019, although claimant left work only after receiving his supervisor's permission. On August 30, 2019, employer terminated claimant's employment for exceeding ten attendance points.

A disqualification decision was mailed to claimant's last known address of record on September 3, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by September 13, 2020. The appeal was not filed until October 21, 2020, which is after the date noticed on the disqualification decision. However, the claimant testified the address in the decision was incorrect. The house number was off by two digits. As a result, claimant did not receive the decision. On October 21, 2020, Claimant contacted the Benefits Bureau to determine the status of his benefits and learned the decision had been issued and mailed to the wrong address. He filed his appeal the same day.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

In this case, Iowa Workforce Development mailed claimant a decision denying benefits to an incorrect address. Without clear notice of a denial decision, claimant did not have a reasonable opportunity to file an appeal. When claimant realized he had been denied benefits, he filed an appeal immediately. The appeal should be accepted as timely.

The next issue is whether claimant's separation from employment disqualifies him from receiving unemployment insurance benefits. For the reasons that follow, the administrative law judge concludes the claimant was discharged 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.

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 attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

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 disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant’s version of events to be more credible than the employer’s recollection of those events. Claimant credibly testified that he never left work early unless his supervisor told him to do so because work was completed for the day. Claimant further noted that he takes a bus to and from work. If he did leave work early without permission he would have nowhere to go since he does not have a vehicle.

The employer has not established that the claimant had excessive absences, which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant’s absences were properly reported and all except one were for illness and are thus excused. Claimant had one unexcused absence, on August 20, 2019, when he was a no call/no show. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. 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 to separation was misconduct under Iowa law.

DECISION:

The appeal is timely. The September 3, 2020, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



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May 14, 2021
Decision Dated and Mailed

sa/scn