IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOHN M PLUEGER Claimant **CARROLL DISTRIBUTING & CONSTRUCTION** Employer	**APPEAL 15A-UI-09804-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/02/15** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 24, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 15, 2015. Claimant participated. Employer participated through branch manager Tom Verzani and Christine Ayers.

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: Claimant was employed full time as a rental/mechanic from October 22, 2014, and was separated from employment on August 6, 2015, when he was discharged.

The employer has an attendance policy that requires employees to show up on time for work. Claimant was aware of the policy. There is also a disciplinary policy that provides for three written warnings prior to termination. The employer also had a procedure in place that if an employee was going to leave early or show up late, they are to contact the branch manager (Mr. Verzani). Mr. Verzani was claimant's direct supervisor. Mr. Verzani testified that if an employee needs time off, there is a form that they are to fill out. Claimant had filled out this form on at least two separate occasions (April 30, 2015 and May 5, 2015).

On January 23, 2015, claimant received a written warning for leaving work early. On January 22, 2015, claimant just left during the middle of his shift and he did not tell Mr. Verzani he was leaving early. When claimant was given his written warning, the employer told claimant he needed to notify Mr. Verzani before he leaves if he is going to leave early. Claimant signed the written warning. Claimant did not give a reason to Mr. Verzani as to why he left work early. Claimant was told that any further violations may result in termination. The employer discussed the attendance policy with claimant at this time.

On April 6, 2015, claimant received a written warning for being fifteen to forty-five minutes late for work on almost every day for approximately three months. Mr. Verzani discussed the written warning with claimant and about his not showing up for work on time. Claimant signed the written warning.

On June 29, 2015, claimant received a written warning for leaving work early without notifying the employer. The incident occurred on June 24, 2015 when claimant left work at 2:50 p.m. without notifying the employer. Mr. Verzani was on vacation on June 24, 2015, but spoke with claimant this incident on June 29, 2015. Mr. Verzani again informed claimant he is to notify the branch manager if he is going to arrive late or leave early.

On August 6, 2015, the employer discharged claimant after he was late to work on multiple occasions. Claimant was late for work on July 13, 14, 15, 16, 17, 27, 28, 29, and 30, 2015. Claimant was also late on August 3, 4, 5, and 6, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

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 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 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. Claimant received three prior warnings for absenteeism in less than a year. This should have put claimant on notice his job was in jeopardy because of his absenteeism. Claimant's argument that it was hard to go to work because he would be sent home or told he could not use the bathroom on company time is not persuasive. Claimant testified he sent e-mails to the district branch manager (Mr. Verzani's

supervisor) on at least two separate occasions (one before April 6, 2015 and one after April 6, 2015) regarding his concerns. Yet claimant did not follow up with the district branch manager when he did not receive any response, despite seeing the district branch manager at the office on more than occasion, including in June 2015 while Mr. Verzani was out of the office on vacation. Claimant was tardy almost every day for approximately three months prior to April 6, 2015 and was warned for this conduct. Then from July 13, 2015 until he was discharged, claimant was again tardy on thirteen days (including the day he was discharged).

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment. The final absences (thirteen tardies in approximately four weeks), in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The August 24, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant 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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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