IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOHN K OXENDINE Claimant **FLUOR DANIEL SERVICES** Employer	**APPEAL 17A-UI-02512-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/29/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 2, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 30, 2017. Claimant participated. Michelle Oxendine participated on claimant's behalf. Employer participated through human resources manager Linda Harris. Equipment general manager Fred Martin registered for the hearing on behalf of the employer, but he did not testify. Claimant exhibit A was admitted into evidence with no objection.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a crane operator from July 25, 2016, and was separated from employment on November 18, 2016, when he was discharged.

The employer has a policy that requires employees to be fully released, with no restrictions, before they can return to work after an injury. The employer also has an attendance policy. Part of the attendance policy provides that if an employee has three consecutive no-call/no-shows, they are automatically discharged due to absenteeism. The employer has a call in number for employees to use if they are going to be absent.

On October 29, 2016, claimant was involved a motorcycle accident. Claimant's accident was not work related. Claimant suffered injuries and his doctor placed him off work from October 29, 2016 until December 5, 2016. Claimant Exhibit A. On October 30, 2016, claimant notified the employer about his injuries and that his doctor would not release him to return to work.

Claimant initially told the employer that he might be off work for approximately a month. Claimant initial spoke to his foreman and Mr. Martin.

On November 2, 2016, claimant left a message for Mr. Martin, but spoke to Ms. Harris and his foreman. Claimant's foreman told him it would not be a problem and he could take as long as he needed. Claimant called the employer on November 4, 2016 and left a message for Mr. Martin. On November 8, 2016, claimant spoke to Ms. Harris and left a voicemail for the foreman. On November 10, 2016, claimant called Mr. Martin and the foreman, but he had to leave them voicemails. On November 15, 2016, claimant called Mr. Martin at 6:54 p.m. Claimant spoke with Mr. Martin for seven minutes on November 15, 2016. Claimant told Mr. Martin that he had gotten a doctor's note and likely told him he would not be released back to work until December 5, 2016. Mr. Martin told claimant everything was ok and to just bring the doctor's note. Claimant lived approximately five hours from the employer. Claimant did not have a mailing address for the employer in order to mail the doctor's note. Claimant called the employer's call in number on November 18, 2016 and left a voicemail. On November 18, 2016, claimant also called Ms. Harris and left a voicemail.

On November 18, 2016, the employer discharged claimant due to personal reasons. On November 18, 2016, Mr. Martin told Ms. Harris he had not heard from claimant in approximately two weeks and could not keep him on the payroll. The employer decided to discharge claimant for personal reasons as opposed to a three day no-call/no-show because it felt it would look better on his employment record with the employer. The employer did not contact claimant to inform him that he was discharged. Ms. Harris testified that she received a lot of phone calls on her personal cellphone from people looking for work and she would delete voicemails without listening to them and may have deleted claimant's voicemails.

Around the end of November 2016 or the beginning of December 2016, claimant received COBRA insurance paperwork from the employer's insurance company because of his separation. When an employee is separated from the employer, COBRA paperwork is sent to the separated employee. When claimant received the paperwork, it was the first time he became aware that he was separated from employment. Claimant then tried to contact multiple people at the employer, including Ms. Harris, but he did not make contact with anyone. Claimant left multiple messages with the employer, but no one returned his messages. Once claimant was released back to work with no restrictions on December 5, 2016, he did not return to the employer, because it was his understanding from the COBRA paperwork that he had been separated from the employer. After November 18, 2016, claimant made other calls to the employer, but the employer did not call him back. The next communication claimant had with the employer after the COBRA letter was on February 27, 2017 when Ms. Harris informed him that he had been separated for personal reasons on November 18, 2016.

Claimant did not have any prior disciplinary warnings.

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.

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 reviewed the exhibit admitted. This administrative law judge finds claimant's version of events to be more credible than the employer'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:
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> 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.
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> 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. 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.*, 743 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.

On October 31, 2016, claimant notified the employer he was injured in a motorcycle accident. The employer's argument that claimant did not inform it how long he would be off work and did not maintain contact with the employer is not persuasive. Claimant credibly testified the notified the employer he was not sure how long he would be off work, but it would be approximately a month. Claimant and Ms. Oxendine credibly testified that claimant made numerous phone calls to the employer, including to Ms. Harris, Mr. Martin, and claimant's foreman. If claimant did not make contact on the phone call, he would leave a message. Claimant and Ms. Oxendine also credibly testified that on November 15, 2016, claimant spoke to Mr. Martin, informed Mr. Martin about his doctor's note, and Mr. Martin told him everything was ok.

It is clear from the evidence that the employer was aware of claimant was injured in an accident and would be off work for a period of time. Claimant also informed Mr. Martin about his doctor's note that released him back to work on December 5, 2016. However, on November 18, 2016, the employer discharged claimant before he was released back to work. Therefore, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's final absences were otherwise related to a known injury, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Accordingly, benefits are allowed.

Furthermore, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

DECISION:

The March 2, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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NOTE TO EMPLOYER:
If you wish to change the employer's of record, please access your account at:
https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY