IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BOL L YUAL Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL 19A-UI-09599-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/03/19** **Claimant: Appellant (2R)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Bol L. Yual, filed an appeal from the November 25, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 2, 2020. The claimant participated personally. The employer, Tyson Fresh Meats Inc. participated through Tami Story, human resources manager. Angie Olpet, benefits counselor, also testified. Claimant Exhibit A was admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a production worker in the freezer warehouse department and was separated from employment on October 24, 2019, when he was discharged for exceeding the points allowed under the employer's attendance policy.

Under the terms of the employer's no-fault attendance policy, employees are subject to discharge if they accumulate ten attendance infraction points within a rolling one year period. Employees are assessed one infraction point for each absence that has not been previously excused, reporting late, and leaving early, result in a partial point and failure to report or notify the employer of the impending absence results in three points being assessed. Employees are given an extra point if their absence coincides with the end or beginning of a work week. If an employee has a no-call/no-show, three points are assessed.

The employer stated the claimant had the following points which led to discharge:

January 25, 2019	Illness	1 point
January 28, 2019	Illness, extra point due to date	2 points
February 2, 2019	Illness, extra point due to date	2 points
October 19, 2019	Tardy, notified employer	2 points
October 22 or 23, 2019	Absent, no-call/no-show	3 points

The claimant was issued warnings for attendance on January 25, 2019 and February 2, 2019. The final incident occurred on October 22 or 23, 2019. The undisputed evidence is the claimant did not report to work for the shift because he was taking care of family matters with his children and girlfriend. The evidence is disputed as to whether the claimant notified the employer of his absence. The claimant had previously reported all of his absences through the attendance line as required. The claimant stated he attempted to call twice the morning of his shift to report the absence to the employer and that the voicemail did not connect. When questioned by the employer, he showed the human resources representative, Stephanie, (who did not attend the hearing) his phone as proof. Because the absence was deemed a no-call/no-show, he "pointed out." If the absence had not been considered a no-call/no-show, he would not have pointed out.

On November 13, 2019, the employer offered the claimant a new position and he declined. The issue of whether the claimant refused a suitable offer of work has not yet been addressed by the Benefits Bureau.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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.

In the specific context of absenteeism, the administrative code provides:

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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)…accurately states the law").

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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.

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there has 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. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

This case turns on the credibility of the parties. The claimant in this case pointed out because he was allegedly a no-call/no-show. If he had properly reported off, he would not have accumulated enough points to be discharged. The employer's evidence supports that each of the claimant's other four absences before discharge were properly reported to the employer. The claimant also credibly testified he made two attempts to contact the employer for his final absence and showed the human resources officer, who did not attend the hearing, the phone reflecting he had tried to call and was unable to leave a voicemail. The employer has not furnished sufficient evidence to corroborate the claimant was a no-call/no-show. The administrative law judge is persuaded that more likely than not, the claimant attempted to properly report his final absence, and by doing so, he would not have pointed out, as alleged by the employer.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

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REMAND: The issue of whether the claimant refused an offer of suitable work with Tyson Fresh Meats Inc. on November 13, 2019, is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The unemployment insurance decision dated November 25, 2019, (reference 01) is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. **REMAND:** The issue of whether the claimant refused an offer of suitable work with Tyson Fresh Meats Inc. on November 13, 2019, is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Jennifer L. Beckman
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Decision Dated and Mailed

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