

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEFF M DEETS

Claimant

HOLIDAY AL MANAGEMENT SUB LLC

Employer

APPEAL 19A-UI-04985-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/19/19

Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

On June 21, 2019, the claimant filed an appeal from the June 14, 2019, (reference 05) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for repeated tardiness in reporting to work. The parties were properly notified of the hearing. A telephonic hearing was held on July 17, 2019. The claimant, Jeff M. Deets, participated. The employer, Holiday Al Management Sub, L.L.C., participated through Austin Veal, General Manager.

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, most recently as an executive chef, from May 8, 2019, until May 12, 2019, when he was discharged.

Claimant was initially supposed to start working for the employer on Monday, May 6, 2019. However, there was a miscommunication between claimant and the employer, and claimant was not notified he was supposed to start that day. Claimant spoke with the employer during the day on May 6 and agreed to start the next day shortly after 8:00 a.m. On May 7, claimant contacted the employer around 8:35 a.m. and reported that he would not be able to start working that day. Veal agreed to let claimant start working the following day.

Claimant was scheduled to report to work at 6:00 a.m. on Wednesday, May 8, 2019. Claimant did not report to work until 8:00 a.m. Claimant contacted the employer around 7:30 a.m. to report that he was running late. Once claimant arrived, he disclosed to the employer that he had a standing medical appointment at 6:00 a.m. and would not be able to report to work until 6:30 a.m. or after. Veal wrote down claimant's schedule on a sticky note and gave it to him.

Claimant was scheduled to report to work at 8:00 a.m. on Thursday, May 9, 2019. Claimant did not report to work until 9:30 a.m. that day. He did not call to notify anyone that he would be late that day. After claimant arrived at work, he met with Veal. Veal told claimant that he needed to start coming to work on time.

Claimant was scheduled to report to work at 8:00 a.m. on Friday, May 10, 2019. Claimant did not report to work until 8:20 a.m. that day. He did not call to notify anyone that he would be late. Additionally, claimant left work three hours early that afternoon. Around noon, claimant spoke to Veal, and Veal told claimant to shadow the other chef until he departed at 4:00 p.m. Claimant then went to the chef and asked if there was work for him to do. The chef said he did not have any work for claimant, so claimant left work at 1:00 p.m.

Claimant's final absence occurred on Sunday, May 12, 2019. Claimant was scheduled to work at 6:00 a.m. Claimant arrived four hours late that day. Veal reached out and contacted claimant between 7:30 a.m. and 8:00 a.m. Claimant indicated he did not realize he was supposed to be there at 6:00 a.m. and would get ready and be there soon. Claimant ultimately arrived around 10:00 a.m. When claimant arrived, Veal sent him home. Later, Veal contacted claimant and discharged him.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

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).

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.

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).

The determination in this case rests in part on the credibility of the parties. 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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible than claimant's testimony.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Certainly, an employer is entitled to establish a start time for the workday and expect an employee to arrive at that time. Claimant failed to arrive on time for any of his shifts with the employer. Additionally, he failed to call within a reasonable time to let the employer know he would be late. Moreover, claimant left work early on Friday, May 10, after Veal explicitly told him to stay at work until 4:00 p.m. Claimant behaved in deliberate disregard of the employer's interests. The employer has established that claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

DECISION:

The June 14, 2019, (reference 05) unemployment insurance decision is affirmed. 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn