IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

GREGORY A BROWN Claimant **QUALITY STRIPING INC** Employer	**APPEAL 14A-UI-12339-L** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/02/14** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The employer filed an appeal from the November 21, 2014 (reference 01) decision that allowed benefits because of a discharge from employment. After due notice was issued, a hearing was held on December 18, 2014 in Des Moines, Iowa. Claimant participated. Employer participated through human resource safety officer Daniel Ebright.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge 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 as a full-time truck driver/laborer from March 31, 2014 through October 25, 2014. His last day of work was October 24, 2014. On October 23 he found out his dental insurance was not active because of a clerical error, even though he had made required premium payments. On October 23 and 24 claimant told Oaks about his ongoing toothache and the dental insurance problem. On Friday, October 24 Polito and claimant worked around the shop because of rainy weather. Polito transferred him to work with job supervisor Warren Stogdill who said he did not need claimant to work and it was okay for him to go home. Company owner Shawn Goodno accused him of "sneaking off" but he was released to leave by Stogdill after Polito sent him to work with him. This discouraged him from communication but he sent a text message to job supervisor Chuck Polito he would not be able to work on Saturday, October 25. Claimant still had tooth pain and his dental insurance coverage was not resolved. Polito did not respond to the text message. Text messages are allowed to communicate with supervisors about attendance issues. The schedule is either texted or posted on a board in the hallway by 5:00 p.m. each day for the following day. Claimant did not receive text messages about being scheduled for work and checked the schedule board on Sunday, October 26 and Monday, October 27 but was not listed as being scheduled to work so did not report. He was

not concerned as some others were not scheduled on Monday and Tuesday either. On Tuesday, October 28 a coworker called and let him know he was not on the board. He intended to contact scheduler Scott Hodges the same day but did not get a chance before he received a message from Oaks telling him that he was considered to have quit and directed him to return the company gas card. Claimant sent in his gas card and received his final paycheck from a coworker. Employees are responsible to check their schedule. There is no policy about no-call/no-show absences. The employer had not previously warned claimant his job was in jeopardy about attendance issues. There was a discussion on an unspecified date when he arrived two minutes early but the employer wanted him to arrive earlier before the job site departure time.

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 Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since the employer did not have a no-call/no-show policy and claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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(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". *Cosper* at 10 holding excused absences are those "with appropriate notice." 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, supra.*

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A 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. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, claimant reported the Saturday absence and the other absences were because he was not listed on the posted schedule and was not texted according to the practice. Although the employer argues he was not scheduled because they were waiting for claimant to communicate with them about the schedule, the employer did not notify claimant or otherwise have a policy or practice for this new and isolated requirement. Thus, his absences were excused and the employer has not established work-connected misconduct. 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. Benefits are allowed.

DECISION:

The November 21, 2014 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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