IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

GEORGE W BERGESON Claimant **SLB OF IOWA LC** Employer	**APPEAL 17A-UI-10129-JC** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/17/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 3, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held in Des Moines, Iowa, on October 18, 2017. The claimant participated personally. The employer participated through Cynthia Kapela, district manager. Employer Exhibit 1 was received into evidence. 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 restaurant associate beginning April 2015, and was separated from employment on September 15, 2017, when he was discharged for excessive tardiness (Employer Exhibit 1).

The employer acknowledged that historically, it was relaxed in the enforcement of its tardiness policy until September 2017. The claimant's start time was 7:00 a.m. each day. Prior to Ms. Kapela's leadership, the claimant had routinely arrived after 7:30 a.m. to work and had told the employer, "you know when I'm going to show up" and was not disciplined, even though his start time was 7:00 a.m. A review of his arrival times between September 6 and 12, 2017 before the new enforcement confirmed he would arrive between 7:32 a.m. and 7:47 a.m. for his 7:00 a.m. shift. However, under Ms. Kapela's leadership, employees at the claimant's store were expected to arrive on time, or else they would be subject to discipline.

Employees received alerts and schedules via the employer's "seven shifts" system which sent text notifications and also allowed employees to log on to view schedules and alerts. The

claimant stated he would receive his schedules via text but denied receipt of other text messages or knowing how to log online. He had previously asked management, other than Ms. Kapela, to have the messages reset so he would receive them, but the issue had not been resolved by the time he separated.

The employer sent out three alerts stating that enforcement of tardiness would begin on September 13, 2017 (Employer Exhibit 1). The first message dated September 7, 2017, stated enforcement would begin September 13, 2017 and there was a 15 minute grace period before an employee was considered late (Employer Exhibit 1). A second alert was sent on September 12, 2017 with the same information. Then on September 13, 2017, Ms. Kapela sent the third message to employees stating there would be no 15 minute grace period as previously indicated (Employer Exhibit 1). The claimant denied receipt of the messages.

On September 13, 2017, the claimant arrived at 7:38 a.m. Per September 7 and 12, 2017 messages, the claimant was considered late even if he was allowed a 15 minute grace period. While he was cashiering, the claimant was presented a written warning, which he did not sign because he was in the middle of cashiering. No further discussion was had with the claimant about his tardiness, except the claimant saying he could not sign it and the manager, Allison Andrews, stating the claimant would not have signed it anyway. On the warning dated September 13, 2017, there is no signature listed for the claimant.

On September 14, 2017, the claimant arrived at 7:30 a.m. which was tardy even with a 15 minute grace period option. The claimant did not present a reason for his tardiness that his delayed arrival was beyond his control. The employer reported the claimant was presented another written warning which he failed to sign. The claimant denied receipt of a second warning. Ms. Andrews drafted the warning and wrote the claimant refused to sign. Ms. Andrews did not attend the hearing or offer a written statement in lieu of participation. When the claimant woke up on September 15, 2017, the claimant learned from another employee via text message, that he would be discharged upon arrival on September 15, 2017, and upon arrival, he was in fact discharged (Employer Exhibit 1).

REASONINGS 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 Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

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. 871 IAC 24.32(4).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. 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). (Emphasis added).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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 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).

The administrative law judge does not condone the claimant's pattern of late arrivals to work and recognizes the importance of staff arriving promptly in smooth running of a restaurant. From the period of 2015 until September 2017, the claimant repeatedly arrived after his 7:00 a.m. start time (usually around 7:30 a.m.) without any discipline. Consequently, the claimant inferred employer acquiescence after multiple tardies without warning or counseling. It was not until September 2017, that the employer through Ms. Kapela's leadership began enforcing the tardy policy. The employer initially offered two conflicting interpretations of the employer policy (stating first there was a 15 minute grace period and then there was not) leading up to September 13, 2017, when tardies would be counted. This is reasonably confusing, even if the claimant had received the messages, which he denied.

Effective September 13, 2017, the claimant had been told he had a 15 minute grace period to start his shift and arrived at 7:38 a.m. He would have been considered late even with a grace period. The claimant was not given a chance to discuss the warning presented to him by Ms. Andrews since he was cashiering. It is unclear why Ms. Andrews did not take time with the claimant off the register to discuss the warning.

On September 14, 2017, he arrived at 7:30 a.m. and would have been tardy under the 15 minute grace period or the amended rule which was sent out on September 13, 2017 to employees, and did not permit a grace period. For purposes of determining unemployment insurance eligibility, the administrative law judge concludes the claimant had two unexcused tardies after the employer made employees (including the claimant) aware of the newly enforced tardy policy. The administrative law judge is not persuaded that the claimant received the second warning on September 14, 2017 and if he had, it was irrelevant inasmuch as the claimant received information he would be fired on September 15, 2017, (which he was) making his arrival on that day moot since the final incident occurred on September 14, 2017.

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. In this case, the claimant had one tardy on September 13, 2017, was issued a

warning while he was cashiering and then tardy again on September 14, 2017. These two tardies led to his discharge upon arrival to work on September 15, 2017.

The administrative law judge is not persuaded the claimant's two tardies would be considered excessive given the proximity, and one warning which was not fully explained to him. . Because the employer did not begin enforcement of the tardy policy until September 13, 2017, tardies before that date would not be considered when evaluating whether the claimant had unexcused tardies as it relates to his unemployment insurance eligibility. Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility.

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 job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The October 3, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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