IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ERIC M WASHPUN Claimant **HY-VEE INC** Employer	**APPEAL 18A-UI-02588-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/18** **Claimant: Appellant (4)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 19, 2018, (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 3, 2018. Claimant participated. Employer participated through hearing representative Lisa Harroff, assistant manager of perishables Sean Wilson, seafood manager Frank McCutcheon, and manager of perishables Casey Langseth. Claimant offered Claimant Exhibit A into evidence. The employer objected to Claimant Exhibit A because it was not relevant (the dates were after the separation date and does not indicate who the calls were to). The employer's objection was overruled and Claimant Exhibit A was admitted into evidence. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record with no objection.

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 part-time as a seafood clerk from November 9, 2017, and was separated from employment on January 8, 2018, when he was discharged.

The employer has an attendance policy that requires employees to know their work schedule and be at work on time. The employer requires employees contact the employer and report their absence prior to the start of their shift. Claimant was aware of the employer's policy. Employer Exhibit 1.

The final incident occurred when claimant was absent from his scheduled shift on January 6, 2018. Claimant was scheduled to work from 5:00 p.m. to 9:00 p.m. Claimant did not call the employer to report his absence until after his shift had already started. When claimant called the employer, he spoke to assistant manager Jordan. Claimant told Jordan he was stuck in Tiffin without a ride. Jordan asked claimant if he needed ride and claimant responded no. The employer then had to find someone to cover claimant's shift. The employer found another

employee (Troy) to cover claimant's shift, but claimant's shift had already started. Claimant was next scheduled to work on January 7, 2018. On January 7, 2018, Mr. McCutcheon sent claimant a message on Facebook Messenger that Mr. Wilson did not want claimant to go to work that night. Mr. McCutcheon instructed claimant to call Tiffany (human resources) or Mr. Langseth on January 8, 2018. On January 8, 2018, claimant called Mr. Langseth. Mr. Langseth told claimant he was discharged for absenteeism.

Claimant was last warned on December 28, 2017, that he faced termination from employment upon another incident of unexcused absenteeism. Employer Exhibit 1. Claimant was also issued a verbal warning on December 4, 2017 for his attendance infractions. Employer Exhibit 1. Claimant was absent from work on: November 24, 2017; and January 6, 2018. Claimant was tardy or left early from work on: November 20, 2017 (tardy); November 21, 2017 (two hours late); November 22, 2017 (left four hours early); December 2, 2017 (an hour late); December 3, 2017 (two hours late); December 16, 2017 (three minutes late); December 19, 2017 (over an hour late); December 22, 2017 (two minutes late); December 28, 2017 (an hour late); December 30, 2017 (two minutes late); and December 31, 2017 (five minutes late).

The administrative record shows that claimant has not requalified for benefits since this separation but reflects he appears to be otherwise monetarily eligible for benefits after this part-time employer's wages are excluded from the base period.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from part-time employment, and has not requalified but appears to be otherwise monetarily eligible.

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 exhibits that were admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

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.

Iowa Code section 96.5(12) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 12. *Supplemental part-time employment.* If the department finds that an individual is disqualified for benefits under subsection 1 or 2 based on the nature of the individual's separation from supplemental part-time employment, all wages paid by the supplemental part-time employer to that individual in any quarter which are chargeable following a disqualifying separation under subsection 1 or 2 shall not be considered wages credited to the individual until such time as the individual meets the conditions of requalification as provided for in this chapter, or until the period of disqualification provided for in this chapter has elapsed.

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).

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. *See 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. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

An employer's absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Claimant's argument that on January 6, 2018 he was contacting the employer all day and he got his shift covered is not persuasive. It is noted that the call logs claimant provided in Claimant Exhibit A, does not show who was being called and it does not show any calls that occurred on January 6, 2018. Mr. Langseth credibly testified that claimant did call the employer on January 6, 2018, but it was after his shift had already started. Mr. Langseth further credibly testified that the employer did not find someone to cover claimant's shift until after claimant's shift had started. Claimant was absent on January 6, 2018 because he did not have a ride to work. The employer had previously warned claimant regarding his absenteeism on December 4, 2017 and December 28, 2017.

The employer has established that claimant was warned on December 28, 2017 that further unexcused absences could result in termination of employment and his final absence on January 6, 2018 was not excused. Claimant's final absence, in combination with his history of unexcused absenteeism, is considered excessive.

Workers who are disqualified from part-time employment based upon the reason for the separation may be eligible to receive reduced unemployment insurance benefits, provided they have sufficient wage credits from other base-period employers to remain monetarily eligible, and provided they are otherwise eligible. *Irving v. Emp't Appeal Bd.,* 883 N.W.2d 179 (Iowa 2016); codified on July 2, 2017, at Iowa Code § 96.5(12). In this event, the part-time employer's account will not be assessed for benefits paid to claimant and the employer's wage credits will not be considered in determining benefits for claimant until he or she has requalified by having worked in and been paid wages for insured work equal to ten times their weekly benefit amount.

Inasmuch as claimant was discharged from employment due to excessive, unexcused absenteeism, the separation is disqualifying. However, claimant has not requalified for benefits since the separation but appears to be otherwise monetarily eligible according to base period

wages. Thus, claimant may be eligible for benefits based upon those other wages. Claimant's maximum and weekly benefit amounts will be redetermined until requalification. This may result in an overpayment of benefits.

DECISION:

The February 19, 2018, (reference 03), unemployment insurance decision is modified in favor of the appellant. Claimant was discharged for misconduct and has not requalified for benefits but appears to be otherwise monetarily eligible. Benefits are allowed, provided claimant is otherwise eligible. The account of this part-time employer (HY-VEE INC, account number 006858-000) shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs