

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT A VINCENT
Claimant

CAT SCALE COMPANY
Employer

APPEAL 21A-UI-11034-JD-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/07/21
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On April 9, 2021, the claimant, Robert Vincent, filed an appeal from the March 30, 2021, (reference 01) unemployment insurance decision that denied benefits based on a determination that the claimant was discharged from employment for excessive unexcused absences. The parties were properly notified about the hearing. A telephone hearing was held on July 7, 2021, and July 13, 2021. The majority of the hearing was completed on July 7, 2021 but the record was held open to allow the employer an opportunity to submit records involving the communication between the parties between December 2020 and January 2021. The July 13, 2021, hearing was held in order to allow the parties to comment or rebut this evidence. Claimant Robert Vincent participated personally along with his wife, Linda Vincent who was also called as a witness. Employer participated through General Manager, Carey Howard, and witness Kevin Cole. Claimant's Exhibit A was admitted. Employer's Exhibits 1 and 2 were admitted. Official notice was taken of the administrative record.

ISSUE:

Was the claimant discharged from employment for disqualifying job related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on April 29, 2019. Claimant last worked as a full-time scale maintenance technician.

The employer owns and maintains numerous semi-truck scales throughout the United States. The employer employs individuals who drive the company's semi-trucks to these locations to repair and maintain the scales and collateral equipment vital to the proper functioning of their scales. The claimant worked full time for the employer as a maintenance technician. Claimant's wife, Linda Vincent rode with him during these assignments. The claimant was separated from employment on January 29, 2021, when the employer terminated the claimant's employment due to claimant being unwilling to travel to Iowa to start a servicing route that started with scales in Walcott, Iowa.

Employer's Exhibit 1 is a written timeline of the communication between the parties during the last six weeks of the claimant's employment. (Employer's Exhibit 1). This exhibit comports with the employer's testimony regarding the type and context of communications the employer had with the claimant. (*Id.*) The claimant and employer communicated via phone on December 29, 2020, to discuss the upcoming assignment and other job related issues. The claimant informed his contact, Kevin Cole that his wife, Linda, had a medical appointment on January 4, 2021, and they would not be able drive to Iowa until January 6, 2021. The employer had not been provided advance notice of this issue but agreed to the delayed departure date of January 6, 2021. *Id.* The employer contacted the claimant on January 5, 2021, to get an update on Linda's medical issues and to determine if the January 6, 2021, date was still workable. *Id.* The Claimant informed his employer that January 6, 2021, was still workable and that he expected to arrive in Walcott, Iowa, on January 8, 2021. *Id.*

On January 7, 2021, Carey Howard, general manager, noticed that the GPS for the claimant's truck had not moved and that the claimant was still in Texas. *Id.* The employer repeatedly called, texted, and emailed, the claimant from January 7 through January 11 to determine why he had not started to drive to Iowa. The claimant called the employer on January 11, 2021, indicating he had pneumonia and that he would not be able to return to work until January 15, 2021. *Id.* The claimant told his employer that he would be on the road to Walcott, Iowa, by January 16, 2021. *Id.* On January 17, 2021, the claimant's GPS indicated he had not left for Walcott, Iowa. The employer attempted daily contact with the claimant between January 17 and January 21, by voicemail, text message, and email. The claimant returned one message on January 19th, on Kevin Cole's office phone after 5:00 p.m. The claimant was aware that Mr. Cole was only accessible on his cell phone after 5:00 p.m.

The employer made contact with claimant on January 22 and was informed that claimant's doctor would not release him until January 27. *Id.* The claimant forwarded his medical release to his employer on January 22, and confirmed he would be driving towards Iowa on January 28. (Employer's Exhibit 1) (Claimant's Exhibit A). On January 28, the claimant drove 100 miles towards Iowa and then turned around and went home. (*Id.*) The claimant indicated he was going home to sleep and that he would be on his way to Iowa on January 29. The claimant made no attempt to travel to Walcott, Iowa on January 29, and was terminated by the employer. The claimant was paid for the month of January 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

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.

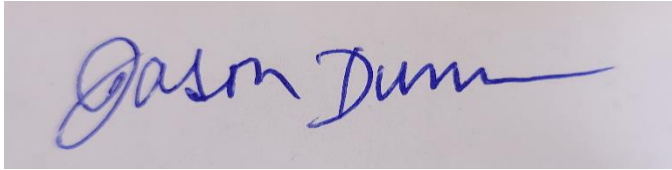
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited 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). 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). When no excuse is given for an absence at the time of the absence and no reason is given in the record, an absence is deemed unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984). See also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

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.*

The fact finder determines that the claimant failed to communicate with his employer throughout the month of January 2021, regarding his ongoing health situation. A doctor’s note does not excuse the claimant from failing to contact his employer regarding his medical situation. If the claimant was too ill to contact the employer, the record established that his wife was not. The claimant failed to return messages from his employer from January 7-11, 17-21, and 25-26, 2021. (Employer’s Exhibit 1). The claimant’s testimony that his employer “knew he was sick” is not credible. The direct evidence in this case indicates almost daily attempts by the employer to contact the claimant. (*Id.*): Claimant’s multi-day absences are unexcused, as there is no credible evidence supporting a finding that they are for medical or other good-cause reasons and they were not properly reported to the employer. Further, these absences, covering nearly the entire month of January, are certainly excessive. Claimant’s Exhibit A is a doctor’s note that was printed on March 29, 2021, and indicates that the claimant was seen at this doctor’s office on January 11, 2021, and was not released until January 29, 2021. (Claimant’s Ex. A). This information does not comport with the information the employer provided through the employer’s timeline (Emp. Exhibit 1) or the claimant’s testimony at hearing. The claimant’s absences were unexcused and excessive. Benefits are denied.

DECISION:

The March 30, 2021, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive unexcused absences. 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.



Jason Dunn
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July 30, 2021
Decision Dated and Mailed

jd/lj