IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ROBERT J TAYLOR Claimant **IOWA MOLD REMOVAL LLC** Employer	**APPEAL 20A-UI-02382-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/23/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On March 18, 2020, Robert Taylor (claimant/appellant) filed an appeal from the March 16, 2020 (reference 01) unemployment insurance decision that found he was not eligible for benefits.

A hearing in this matter was originally scheduled for April 29, 2020. The hearing was continued at the request of employer, who wished to provide proposed exhibits. The hearing was rescheduled for May 7, 2020.

Prior to the hearing, on May 4, the claimant submitted to the appeals bureau a request for a subpoena for documents from employer. The request was considered at the May 7 hearing. The request was granted and a subpoena was issued. Employer was also granted additional time to provide his exhibits, which he had not properly submitted to both the appeals bureau and the claimant prior to the hearing.

The hearing was then again rescheduled for May 21, 2020. At that time, it became clear claimant had not received the employer's proposed exhibits. The exhibits were sent by the appeal bureau to claimant and received by him at the time of the hearing. The hearing was rescheduled for May 22, 2020.

A hearing was held at that time. The parties were properly notified of the hearing. The claimant participated personally. Iowa Mold Removal, LLC (employer) participated by owner and president Vince Oselette.

Employer's Exhibits 1-7 were admitted into evidence. Official notice was taken of the administrative record.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time mold remediation technician. Claimant began working for employer in the summer of 2018. The last day claimant worked on the job was February 4, 2020. Claimant's immediate supervisor was Craig Kintz. Claimant's schedule varied depending on jobs. Claimant separated from employment on or about February 6, 2020. Claimant was discharged by Oselette at that time. See Exhibit 4.

The final incident leading to discharge occurred on February 5, 2020. Claimant was assigned to a job in Hornick, Iowa, an approximately three-hour drive from employer's place of business. Claimant and Oselette spoke several times before this job and agreed claimant would work Monday, February 3 through Wednesday, February 5, and then drive back. This was because claimant had important personal appointments on Thursday he needed to get to.

Claimant and Oselette did not ever discuss claimant leaving Tuesday night or Wednesday morning. Oselette would not have had claimant make the trip if it was only going to be for two days, as it was a long drive both ways and Oselette had to pay for a hotel, gas, food, and other expenses for the trip. See Exhibits 1, 2, 3.

Claimant contacted Oselette on February 4, 2020, because claimant was concerned Kintz was not running the job site in a safe manner. Oselette traveled to the job site that day to check on things. Claimant did not ask Oselette at that time about returning home prior to the end of the day Wednesday.

Oselette heard from Kintz the following morning, February 5, that claimant returned to the job site briefly that morning and then left to go home. Oselette called claimant around noon on that day to inquire about why he left early. Claimant said he was not getting along with Kintz and did not like how things were going at the job site.

Claimant got back to employer's location in West Des Moines around 3 or 3:30 p.m. that day. Oselette reviewed tracking information for claimant and was able to see he spent approximately two hours at a casino on the way home.

Claimant had previously been disciplined on September 13, 2019 for being approximately two hours late to work without notice on September 10 and 13, 2019. Claimant was warned at that time that further absenteeism would result in discharge. See Exhibit 5.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the March 16, 2020 (reference 01) unemployment insurance decision that found claimant ineligible for benefits is AFFIRMED.

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 provides in relevant part:

> 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.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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).

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).

Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc*., 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there have 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.

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 administrative law judge found Oselette's testimony to be more credible and reliable than Claimant's. Factual disputes were settled accordingly. Claimant was particularly evasive when questioned about whether he stopped at a casino on the way back from the job site. He initially testified that he pulled over to reschedule some appointments and he may have pulled over near a casino to do that. Oselette then stated that at the fact-finding interview, claimant had acknowledged stopping at a casino on the way home for lunch.

When questioned about this potential discrepancy between his statement at the fact-finding interview and his testimony on the same topic during the hearing, claimant deflected. He offered non-responsive testimony about whether he should have been paid for travel or mileage back from the job site. He also said the fact-finding interviewer was argumentative with him. He then made qualified statements, saying he maybe stated during the fact-finding interview that he stopped at a casino but he was not sure. When asked repeatedly what his testimony today was regarding whether he pulled over at the casino, he said he could not remember whether he stopped at a casino or ate lunch there, in part because it was "so long ago."

If claimant truly could not recall whether or not he stopped at a casino on the way home, it raises serious questions about the reliability of his memory. This event happened just several months ago, and one would imagine that stopping at a casino on the way home from one's last day of work would not be easily forgotten. The differing, qualified, and unresponsive statements claimant made when questioned about this issue also suggest claimant's testimony was less than fully truthful. Either way, the credibility and reliability of claimant's testimony is strongly called into question as a result.

Claimant's absence on February 5 was unexcused. This most recent absence was particularly egregious in the circumstances, as claimant was on a remote job site at significant expense to employer and did not contact employer to report or request the absence. He furthermore stopped at a casino for some time on the way home. Oselette only learned of the absence when Kintz reported it to him. Oselette then learned the absence was due to claimant being dissatisfied with how Kintz was running the job site. This is not reasonable grounds for leaving work without permission. Furthermore, claimant had previously been disciplined for absenteeism and warned that further absenteeism would result in discharge. Nonetheless, claimant made the decision to leave early without notice or permission.

The administrative law judge finds claimant's absenteeism was both unexcused and excessive. Employer has carried its burden of proving claimant is disqualified from receiving benefits

because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2).

DECISION:

The March 16, 2020 (reference 01) unemployment insurance decision is AFFIRMED. Claimant is not eligible for benefits until he earns wages for insured equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

May 29, 2020
Decision Dated and Mailed

abd/scn

Note to Claimant:

This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at https://www.iowaworkforcedevelopment.gov/pua-information.