IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WALTER E LINARES Claimant **ALLSTEEL INC** Employer	**APPEAL 19A-UI-06733-AW-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/03/19** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – DM – Excessive unexcused absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Employer/appellant filed an appeal from the August 14, 2019 (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on September 18, 2019, at 2:00 p.m. Claimant participated. Spanish interpretation was provided by Elba (ID number 12018), Natalie (ID number 11859), and Ivan (ID number 12195) from CTS Language Link. Employer participated through Pamela Drake, hearing representative. Rory Goettsch, group lead, and Jessica Enriquez, MCR generalist, were witnesses for the employer. Employer's Exhibits 1 – 6 were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant was discharged for disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged due to its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an assembler from October 9, 2017 until his employment with Allsteel, Inc. ended on July 17, 2019. (Enriquez Testimony) Claimant worked first shift Monday through Friday. (Enriquez Testimony) Claimant's direct supervisor was Rory Goettsch. (Goettsch Testimony)

Employer has a points-based attendance policy. (Exhibit 5; Enriquez Testimony) The policy requires employees to notify employer of any absences within four hours prior to the start of

their shift. (Exhibit 5, p. 4; Enriquez Testimony) The policy outlines progressive discipline for violations, but also states, "two consecutive work days of not reporting and not calling in to report the absence is considered a voluntary quit and the member's employment is terminated." (Exhibit 5, pp. 4 & 5; Enriquez Testimony) Claimant received the attendance and absenteeism procedure. (Exhibit 6) The policy requires supervisors to provide their employees with the method of notice. (Exhibit 5, p. 1; Enriquez Testimony) Claimant's supervisor told him to call the attendance line to report an absence. (Claimant Testimony) However, it was common practice for claimant and his coworkers to send a text message to their team lead, Jake, when they would be absent from work. (Claimant Testimony) Claimant was never told not to text Jake notice of an absence. (Claimant Testimony)

Claimant was absent from work on May 13, 2019 due to illness and notified employer of his absence prior to the beginning of his shift. (Claimant Testimony) Claimant was absent from work on June 10, 2019 due to illness and notified employer prior to the beginning of his shift. (Claimant Testimony) On June 10, 2019, claimant was issued a first level attendance corrective action notice. (Enriquez Testimony; Exhibit 2) Claimant left work early on June 12, 2019 due to illness and notified employer prior to leaving work. (Claimant Testimony) Claimant was absent from work on July 15, 2019 due to illness. (Claimant Testimony) Claimant sent a text message to Jake prior to the beginning of his shift stating that he would be absent from work. (Claimant Testimony) Claimant was absent from work on July 16, 2019 due to illness, but did not notify employer prior to his shift. (Claimant Testimony)

On June 17, 2019, employer discharged claimant for violation of the attendance policy for failing to report to work and not calling in to report the absence (i.e. no-call/no-show) on July 15, 2019 and July 16, 2019. (Enriquez Testimony; Goettsch Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Iowa Code section 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 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:

> 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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 Admin. Code r. 871-24.32(8) provides:

> (8) *Past acts of misconduct*. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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).

Excessive absences are not considered misconduct unless unexcused. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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*, 321 N.W.2d at 9; *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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id*.; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

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. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 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).

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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 findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the claimant's testimony credible in that it was common practice to text the team lead regarding absences.

Claimant's absences on May 13, 2019, June 10, 2019 and June 12, 2019 were due to illness, which is reasonable grounds, and were properly reported. Therefore, these absences were excused and do not constitute misconduct. Claimant's absence on July 15, 2019 was due to illness, was properly reported and, thus, is excused. Claimant's absence on July 16, 2019 was due to illness but was not properly reported; therefore, it is unexcused. One unexcused absence during nearly two years of employment is not excessive. Even if I were to find that claimant's July 15, 2019 absence was unexcused for lack of notice, two unexcused absences during claimant's employment would not be excessive. Employer has not met its burden of proving disqualifying job-related misconduct. Benefits are allowed provided claimant is otherwise eligible. Because claimant's separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The August 14, 2019 (reference 02) unemployment insurance decision is affirmed. Benefits are allowed provided claimant is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

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Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/rvs