

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL J TOSCH
Claimant

JENSEN CONSTRUCTION CO
Employer

APPEAL 16A-UI-07479-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/05/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 27, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on July 26, 2016. The claimant Michael Tosch participated and testified. The employer Jensen Construction Co. participated through Project Engineer Landon Streit. Claimant's Exhibit A was received into evidence.

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 full time as a laborer from February 2016, until this employment ended on June 9, 2016, when he was discharged.

The employer has a policy in place which requires employees to be to work each day at their scheduled times. If employees are going to be late or absent they are required to notify a supervisor, preferably a day in advance. On June 9, 2016, claimant was tardy to work. Streit testified this was not the first time claimant was tardy or had unexcused absences. Streit could not recall when these other incidents occurred or how often, but estimated it was maybe five times prior to June 9. Streit testified claimant was warned that further absences or tardies may lead to termination, but could not recall when these warnings were given.

Claimant admitted to being late to work on June 9. Claimant testified he was only late on one other occasion and that was towards the beginning of his employment. Claimant had been absent from work on at least three dates due to the illness of his two year old child, but was told by Streit that these absences would be considered excused and not counted against him if he brought in a doctor's note, which he did. Claimant could not think of any other times he was

absent or tardy. Claimant denied he was ever warned about his attendance or that his job may be in jeopardy.

REASONING 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:

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.

871 IAC 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.* Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). 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 employer testified that claimant had been absent or tardy a number of times and that he was warned if this continued his employment would be terminated. The employer could not, however, recall the dates or circumstances surrounding these absences or warnings. The employer also provided no documentation supporting its claims. The claimant denied he was tardy more than twice or that he was ever warned his job was in jeopardy. The claimant further testified all of his absences had been excused by the employer. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's recollection of events to be more credible than the employer's version of those events.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. 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 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. 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).

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

In the present case, claimant was late to work twice. Claimant was also absent three times, but was informed by the employer that those absences were considered excused and did not count against him. Accordingly, claimant's only unexcused absences were his two tardies. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Furthermore, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

DECISION:

The June 27, 2016, (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. Benefits withheld based upon this separation shall be paid to claimant.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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