IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOHN P SMITHBURG Claimant **WEST LIBERTY FOODS LLC** Employer	**APPEAL 16A-UI-04966-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/10/16** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the April 26, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for excessive absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on May 12, 2016. The claimant, John P. Smithburg, participated personally. The employer, West Liberty Foods LLC, participated through Human Resources Supervisor Monica Dyar. Employer's Exhibits 1 and 2 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a mechanic. He was employed from August 11, 2014 until April 11, 2016. His job duties included preventative maintenance and repairs on the machinery. He worked 5:00 a.m. to 5:30 p.m. Sundays through Wednesdays. Brent Hawkinson was his immediate supervisor.

Employer has a no fault attendance policy. When an employee incurs eight points or more they are subject to discharge from employment. An employee must call in at least two hours prior to their scheduled shift start time in order for an absence or tardy to be properly reported.

Claimant was absent, tardy, or left early on the several occasions. See Exhibit 2. On April 13, 2015 claimant was tardy to work by one hour and eleven minutes. The employer had no record that claimant called in prior to his shift beginning.

On September 4, 2015 claimant was not at work due to personal illness. He did properly report his absence on this occasion.

On October 12, 2015 claimant was tardy to work by two minutes. He did not properly report his tardiness and was tardy due to oversleeping.

On October 18, 2015 claimant was not at work due to personal illness. He did properly report his absence on this occasion.

On November 11, 2015 claimant left work early. He did notify his supervisor he was leaving. He left early on this date because his mother had suffered a heart attack and he had been notified by family that day it occurred.

On December 27, 2015 claimant was not at work due to personal illness. He did properly report his absence on this occasion.

On February 5, 2016 claimant was absent. He did properly report his absence. He was absent because his sister needed help transporting his mother to the hospital on this day.

On February 18, 2016 claimant was tardy to work. He did not properly report this absence because he did not call in prior to his shift beginning. He was tardy due to oversleeping.

On March 11, 2016 claimant left work early. He did report to his supervisor but there was no reason given as to why claimant left early on that date. Claimant does not remember why he left early on that date.

On March 24, 2016 claimant was not at work due to personal illness. He did properly report his absence on this occasion.

On April 7, 2016 claimant was tardy to work. He did not call and properly report his tardiness that date. He was tardy due to vehicle issues in either a flat tire or problem with his car battery.

Claimant was issued four attendance discussions or written warnings prior to his final incident of tardiness. He was not provided a copy of these documents but he was given an opportunity to read the warnings. The warnings stated that if a team member reaches an occurrence total of 8.00 or more in any 12-month period, termination will occur. Claimant believed that the employer's policy was 10.00 points before termination would occur. However, this 8.00 point system had been in place during claimant's entire employment.

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. Benefits are denied.

As a preliminary matter, I find that claimant did not quit. Claimant was discharged from employment for 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(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). The claimant had been issued four written warnings regarding his attendance prior to the final incident on April 7, 2016. The claimant knew that he needed to come to work on time and stay for his entire shift.

Claimant had been on notice that the employer had a point system in place wherein termination could occur if he received 8.00 or more points. Claimant knew this from the written warnings and from the handbook and initial orientation he received.

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); *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 is not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984)(emphasis added). 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). 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.

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).

The claimant was tardy on April 13, 2015; October 12, 2015; February 18, 2016; and April 7, 2016. These instances of tardiness were not for reasonable grounds and are unexcused. He was absent on February 5, 2016 and March 11, 2016. He was absent on February 5, 2016 due to a transportation issue with his mother. He was absent on March 11, 2016 for no reason. These are not for reasonable grounds and are unexcused. As such, claimant had six instances of either unexcused absences or tardiness in almost twelve months.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on April 7, 2016 was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The April 26, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs