

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JASON L PENDLETON
Claimant

KRAFT HEINZ FOODS COMPANY
Employer

APPEAL 17A-UI-11211-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/08/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 30, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 20, 2017. Claimant participated. Paralegal John Graupmann participated on claimant's behalf. Employer participated through human resources generalist Amy Matlick. Claimant Exhibits A, B, and C were admitted into evidence with no objection. Employer Exhibit 1 was admitted into evidence with no objection.

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 production team member from July 25, 2016, and was separated from employment on October 9, 2017, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employer Exhibit 1. The policy also provides that an employee will be warned at twelve attendance points, and will be discharged upon receiving two more attendance points after their warning. After ninety days of perfect attendance, one occurrence will be removed. The employer requires employees contact the employer and report their absence prior to the start of their shift. The employer does require employees to work mandatory overtime. Claimant was aware of the employer's policy. Employer Exhibit 1.

The final incident occurred when claimant was tardy on October 2, 2017 to his shift. Claimant Exhibit B. Claimant was 2.5 hours late to work on October 2, 2017. Claimant Exhibit B. The employer gave claimant one attendance point for this tardy, which gave him a total of fifteen attendance points. Claimant Exhibit B. The employer then conducted an investigation to ensure claimant's attendance points were accurate. On October 9, 2017, the employer informed claimant he was discharged.

Claimant was given a final warning for absenteeism on September 7, 2017. Employer Exhibit 1. The employer warned claimant that he faced termination from employment upon further incidents of unexcused absenteeism. Employer Exhibit 1. Claimant accrued attendance points on: August 31, 2016 (left early without working overtime (.5 points)); October 21, 2016 (left early without finishing the two hours of overtime (.5 points)); October 26, 2016 (left early because he was having issues with coworkers (1 point)); November 2, 2016 (absent due to illness (1 point)); December 2, 2016 (left early (1 point)); December 8, 2016 (left early without working overtime (.5 points)); December 20, 2016 (left early without working overtime (.5 points)); January 31, 2017 (left early due to illness (1 point)); February 23, 2017 (left early due to illness (1 point)); March 17, 2017 (absent due to illness (1 point)); May 5, 2017 (left early without working overtime (.5 points)); May 19, 2017 (1 point); June 2, 2017 (left early according to claimant's punch out time (1 point)); June 3, 2017 (absence due to illness (1 point)); August 24, 2017 (left early (1 point)); September 16, 2017 (absent due to illness (1 point)); September 25, 2017 (left early without working overtime (.5 points)); and October 2, 2017 (tardy (1 point)). Claimant Exhibit B.

REASONING AND CONCLUSIONS OF LAW:

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

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(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 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).

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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

Claimant's argument that he was scheduled to start work at three different times on October 2, 2017 is not persuasive. This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits admitted into evidence. Claimant's testimony during the hearing was inconsistent. When claimant was initially questioned about his attendance points for May 19, 2017 and August 24, 2017, he testified he left early due to illness and he left early due to an issue with coworkers, respectively. However, claimant later testified during the hearing that he left early on May 19, 2017 due to harassment from coworkers and he left early on August 24, 2017 because of his son's medical issue. Further, claimant testified he worked his entire shift on June 2, 2017; however, Ms. Matlick credibly testified that his punch out time showed claimant did work on June 2, 2017 and he punched out early that day. It is also noted that claimant presented his calendar sheets regarding his start times and hours worked; however, he only provided four weeks of his calendar sheets, he did not provide a calendar sheet regarding any days he accrued attendance points, and he skipped the week covering his attendance point August 24, 2017, but provided the week before and the week after this attendance point. See Claimant Exhibit C. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

An employer's point system or no-fault 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. During claimant's employment, he had multiple incidents where he left work without working the mandatory overtime and he was warned on September 7, 2017 that if he accrued two more attendance points he would be separated from employment. Despite this warning, claimant was over two hours late to his shift on October 2, 2017. The employer has established that claimant was warned that further unexcused absences could result in termination of employment and his final tardy on October 2, 2017 was not excused. Claimant's final absence,

in combination with his history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The October 30, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs