

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

AMANDA E FOOR
Claimant

MUSCO SPORTS LIGHTING LLC
Employer

APPEAL 16A-UI-10279-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/28/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 16, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 13, 2016. The claimant participated personally. The employer participated through Tina Schaffner, human resources manager. Claimant exhibit A and Employer Exhibit 1 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as an assembler and was separated from employment on August 25, 2016, when she was discharged for excessive tardiness.

The employer tracks an employee's punctuality by way of the employee entering the premises and swiping their badge through the time keeping system. The employer offers no grace period for employee to arrive after their start times, without being subject to discipline. The employer acknowledged that during the claimant's eleven years of employment, punctuality had not always been enforced but upon hiring of a new manager several months before the claimant's separation, the expectations were revisited and reiterated with employees.

Prior to discharge, the claimant received a verbal warning on February 17, 2016 with her manager and human resources partner (Employer exhibit 1) in response to her attendance issues including repeated tardiness. The claimant was informed about EAP at the time and encouraged to explore FMLA. The claimant was then tardy again May 2, 9, 16, 18, 19, 25, 31 and June 1, 2016. The tardies ranged from one minute to forty three minutes late, and the employer issued a written warning to the claimant on June 8, 2016 (Employer exhibit 1). The

claimant then was tardy again June 10, 22, July 5 and 6, 2016, for periods ranging from one minute to thirty minutes late (Employer exhibit 1). The claimant was put on probation for ninety days and made aware her job was in jeopardy. She also lost her senior non-exempt status as discipline for her continued tardiness (Employer exhibit 1). The claimant was then late again on July 18, 2016. The employer spoke to the claimant rather than discharge her immediately. Then on August 19, 2016, the claimant overslept and called the employer around 3:25 p.m. to report she was late to her 3:00 p.m. shift. When she arrived, she was upset and distraught, causing the employer to take her to the first aid center to calm down. It was the employer's impression that the claimant was upset because she knew her job was in jeopardy and she was late again. No medical documentation was furnished to the employer or for the hearing to reflect the claimant was late due to a medical episode. She was subsequently discharged for repeated tardiness.

The claimant acknowledged she had been warned for tardiness and did not deny the listed tardies. The claimant offered multiple explanations for her tardiness, including that she was on time for some of the tardies, and began stretching or work on time but forgot to clock in. She also stated she overslept. She also reported she had anxiety attacks that would occur when the claimant was en route to work resulting in the claimant "bawling" in her car or parking lot, causing her to be late. The claimant indicated her anxiety and panic attacks were so severe that she would sometimes be unable to sleep until 8:00 a.m. upon leaving work. The claimant's medical history acknowledges ongoing treatment for anxiety and depression (Claimant exhibit A). The claimant also acknowledged she did not visit a doctor between May and August (the period of the tardies) to address ongoing anxiety or panic attacks, or that she was unable to get to work on time because she was experiencing attacks. The claimant did not utilize the employer's EAP services or make any attempts to secure FMLA. The claimant offered multiple explanations for not pursuing either medical care or a leave of absence, including that she worked overtime, and that she could not go due to her work schedule. Even though the claimant began work in the afternoon, usually around 3:00 p.m., the claimant dismissed going to the doctor during the day because she was often up late from the night before at work and then would have anxiety attacks causing her to be unable to sleep.

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.

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(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.

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The claimant was issued verbal and written warnings on February 17, June 8, and July 8, with regard to her repeated tardiness. The claimant was also issued a 90 day probation in response to the July 8, 2016 warning and was then again tardy on July 18, 2016. Instead of firing the claimant, she was given one more chance. The final incident occurred when the claimant was over 25 minutes late to her shift on August 19, 2016. When the claimant arrived, she was understandably upset, recognizing her job was in jeopardy. The evidence is conflicted as to whether the claimant was discharged due to oversleeping or an anxiety attack.

The administrative law judge is sympathetic to the claimant's history of depression and anxiety, but no competent, medical documentation was provided to the employer or at the hearing that corroborated the claimant's assertions that her repeated tardiness was a result of anxiety. The claimant herself offered multiple explanations for the tardies, indicating they were attributed to anxiety/crying attacks in the parking lot/car and also that she was on time but forgot to clock in in light of repeated warnings. The evidence is also disputed as to whether the claimant reported she had overslept when reporting her tardy on August 19, 2016. The administrative law judge finds it concerning that on the one hand the claimant asserted she had such anxiety that she could not enter the work place fourteen times in a three month period on time, but then refused tools offered by the employer to protect her job (such as EAP or FMLA), or make any attempts to visit a doctor during the three months in question. Based on the conflicting explanations and

inconsistencies offered in the claimant's testimony, the administrative law judge finds the employer's hearsay testimony to be more credible than the claimant. The employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The September 16, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs