IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

STACEY R RIBBEY Claimant **LISLE CORPORATION** Employer	**APPEAL 16A-UI-06039-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/24/16** **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 May 19, 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 June 15, 2016. The claimant participated personally. The employer participated through Tracy Roush, human resources manager. Nick Herzberg, assistant foreman, also testified for the employer. Based on the evidence, the arguments of the parties, 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 in the packaging department and was separated from employment on April 19, 2016, when she was discharged.

The employer has an attendance policy which tracks attendance violations and applies progressive discipline in response. The employer also has a union contract, under which the claimant's employment was covered, that indicated two consecutive no call/no shows are considered to be a voluntary quit. The claimant was made aware of the policies upon hire. The claimant was issued a verbal warning for attendance on June 6, 2015, a written warning on February 16, 2016, and a suspension on February 25, 2016. At the time of separation, the claimant had no available vacation time either.

The claimant last performed work on April 5, 2016. The employer was aware the claimant had an ongoing complex dental issue. On April 12, 2016, the claimant notified Ms. Roush that she was going to the dentist for oral surgery. Ms. Roush asked for a doctor's note to cover the absence. The claimant had complications from three teeth extractions and infection. On April 14, 2016, the claimant's dentist called in to the employer to report she remained in

significant pain and could possibly return the following day. The employer gave the claimant the benefit of the doubt when she failed to call in or return to work on April 15, 2016, based on her dentist's call. The undisputed evidence presented at the hearing is that the claimant discontinued calling the employer. The claimant stated she quit calling because she believed Ms. Roush knew she was off due to her oral surgery until April 20, 2016. Ms. Roush denied knowing any expected return to work date or indicating the claimant did not need to report her absences. As a result, the claimant was a no-call/no-show on April 18 and 19, 2016, she exceeded the permissible attendance infractions and was deemed to have separated under the union contract.

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 Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since the claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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.

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). (Emphasis added).

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*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant had been previously counseled for her attendance on three occasions, and served a suspension on February 25, 2016 for her attendance. The claimant was aware of the proper call off procedures and demonstrated her ability to follow them when she reported to Ms. Roush that she would be absent from work due to her oral surgery April 12, 2016. The undisputed evidence is that the claimant quit calling in to report her absences but did not return to work since she was still recovering, which resulted in two additional attendance violations by way of no-call/no-show on April 18 and 19, 2016. The employer did not even take into consideration the claimant's absence on April 15, 2016 since the dentist personally called the employer the day before to update them on her status.

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 administrative law judge is sympathetic to the claimant's recovery from oral surgery, but is not persuaded she was relieved of responsibility for reporting her absences each day she continued to recover. 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 May 19, 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.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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