IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

FEDERICO MENDOZA Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL 16A-UI-13232-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/20/16** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 8, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 4, 2017. Claimant participated. CTS Language Link interpreter ID #9508 interpreted on claimant's behalf. Employer participated through human resources manager Jeanth Ibarra. Sarah Ochoa registered for the hearing on behalf of the employer, but she did not attend the hearing.

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 worker from January 27, 2009, and was separated from employment on November 18, 2016, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies. The policy is explained on the bulletin boards in English and Spanish. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. Employees receive one point if they properly report their absence and three points if they do not properly report their absence. If an employee is a no-call/no-show, it results in three points. The employer has an unwritten policy that if an employee is a no-call/no-show for three consecutive days, they are discharged. If an employee is going to miss work, they are to call the employer at least thirty minutes prior to their shift starting to report their absence. Claimant was aware of the employer's policy.

Within the past year, the employer gave claimant two written warnings for his attendance infractions in 2016. Claimant was warned on January 4, 2016 and July 15, 2016 (claimant had six attendance points). Claimant had other warnings, but they were over a year old.

After claimant's last warning on July 15, 2016, claimant had further absences. Claimant was absent from September 6, 2016 to September 12, 2016. The policy provides that if an employee is absent for five consecutive days, they only receive three points. Claimant received three points for these absences. Claimant properly reported these absences and was on a medical leave of absence. On November 14, 2016, claimant was absent. Claimant properly reported his absence due to illness. Claimant received one point for this absence, which gave him a total of ten points. On November 15, 16, and 17, 2016, claimant was scheduled to work, but he was a no-call/no-show each day. Claimant received three points for each day. On November 16, 2016, claimant's supervisor called claimant and asked him why he was not coming to work. Claimant told the supervisor that he realized he had too many attendance points and that is why he stopped calling in and coming to work. The supervisor asked claimant to come to the employer on November 17, 2016 to discuss his employment. Claimant did not come to the employer on November 17, 2016. On November 17, 2016, claimant was a no-call/no-show. After the November 17, 2016 absence, claimant was at nineteen attendance points and the employer discharged him. Claimant did not have contact with the employer after November 16, 2016, until November 21, 2016. On November 21, 2016, claimant made contact with the employer and the employer told him he had been discharged the week before.

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.

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).

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 finds the employer's version of events to be more credible than claimant's recollection of those events.

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:
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> 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 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).

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. Although claimant reached ten attendance points after his November 14, 2016 absence, the employer had not told him he was discharged. Claimant was a no-call/no-show on his last three absences (November 15, 16, and 17, 2016). On November 16, 2016, a supervisor even contacted claimant and told him to come into the employer on November 17, 2016 to discuss his employment status, but clamant failed to report to the employer and did not contact the employer until November 21, 2016. Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation may be considered job abandonment. Since the employer does not have a policy as set out in Iowa Admin. Code r. 871-24.25(4), claimant's three consecutive no-call/no-shows are not considered a voluntary quit, but his absences are considered excessive and were not excused. Furthermore, claimant was warned twice in 2016 regarding his absenteeism. Claimant's final absences (no-call/no-show on November 15, 16, and 17, 2016), in combination with his warnings about his absenteeism, are considered excessive. Benefits are withheld.

DECISION:

The December 8, 2016, (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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs