IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JASON BAILEY Claimant **FARM & CITY SUPPLY LLC** Employer	**APPEAL 17A-UI-02386-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/29/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 22, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 27, 2017. The claimant participated personally. The employer participated through Jeret Koenig, member. Department Exhibit D-1 was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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.

ISSUES:
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a store manager and was separated from employment on January 30, 2017, when he was discharged for excessive absenteeism.
The employer runs a small business, consisting of only two employees working at a time. The claimant was a store manager. The employer has an attendance policy which provides employees are to submit a "leave off request form" two weeks in advance of an absence, whenever possible (Department Exhibit D-1). The policy recognizes a form may not be practical in cases of illness or funerals, and requests employees find coverage for shifts missed (Department Exhibit D-1). The claimant was aware of the employer's policy and expectations. The undisputed evidence is that prior to discharge, the claimant was not issued any written discipline or informed his job was in jeopardy. The employer acknowledged the claimant had been absent in the past, but that it was his pattern of absences between January 10 through 30, 2017, that ultimately led to his discharge.

The claimant was absent from work and properly notified the employer of his absences on January 11 and 12, related to the funeral of his aunt. The claimant was then involved in a car accident involving a deer on the way home from the funeral and called off work January 13, 2017 to address car repairs. The claimant acknowledged he could have worked while the car was being repaired, but had permission to miss work from Bryant Abel. (Mr. Abel did not attend the hearing or offer a written statement in lieu of participation.) The claimant was off work January 14 and 15. On January 16, 2017, the claimant appeared to have worked one hour of his eleven hour shift, when he left work early to pull someone from a ditch. According to the claimant, he did leave work early to help someone, but also then performed work by meeting with customers in the field. Because the claimant was salaried, he was not responsible for clocking in and out, as an hourly employee would. The claimant further stated he documented his efforts to meet with customers for that shift, to which the employer denied receipt. The claimant then properly reported his absences on January 17 and 18, related to illness. The claimant worked only 4.5 of his 6.5 scheduled hours on January 20, 2017, stating he was again in the field making contacts. The claimant was not scheduled January 21 or 22, 2017, but on January 23, 2017, notified the employer via email that he intended to take vacation time off January 26 through 29, 2017, to attend a Donald Trump leadership conference (Department D-1). The employer had determined it would discharge on January 24, 2017, and discharged him upon return to the store on January 30, 2017. There was no evidence that the claimant was warned not to take time off, that his continued absences could result in discharge or that he had failed to secure adequate staffing for his absences.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1405.00, since filing a claim with an effective date of January 29, 2017. The administrative record also establishes that the employer did participate in the February 20, 2017 fact-finding interview by way of Jeret Koenig and Bryant Abel.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged but not for disqualifying related misconduct. Benefits are allowed.

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.
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> 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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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).

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.

In the specific context of absenteeism, the administrative code provides:

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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

The administrative law judge is persuaded the claimant was aware of the employer's policies which required a leave form for absences to be submitted two weeks in advance of scheduled absences. None of the absences between January 10 through 30, 2017 had a completed leave absence form or were with two weeks' notice. It is also unclear from the evidence presented whether there was adequate staffing arranged to cover the absences. The claimant's absences ran the gamut from illness, a funeral, to hitting a deer to pulling a person from a ditch, to attending a leadership conference related to Donald Trump. The employer also alleged the claimant did not complete required documentation accounting for time worked while not on site, but no policy was provided detailing the employer's expectations, nor was any warning given to the claimant for failure to comply.

The administrative law judge is sympathetic to the reasonable positions of each party because of the failure to communicate promptly and clearly with each other, however, at no time was the claimant advised if he continued calling off work (regardless of reason), that his job was in jeopardy. Although the claimant was absent repeatedly for reasons other than illness or unavoidable incidents (such as the funeral), since the employer had not previously warned the claimant about its specific expectations about reporting, frequency of absences, or arranging absences in advance, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee might even infer employer acquiescence after multiple unplanned absences without disciplinary warning or counseling.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. Training or general notice to staff about a policy is not considered a disciplinary warning. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The February 22, 2017, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer is not relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs