IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

RAYMOND M BARTH Claimant **HY-VEE INC** Employer	**APPEAL 16A-UI-06492-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/01/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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 June 2, 2016 (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 28, 2016. The claimant participated personally. The employer participated through Dalene Turner, hearing representative for Corporate Cost Control. Employer witnesses included Tracy Wise, Jeremy Hayes, and Deb Borwig. Employer's Exhibit One and Claimant's Exhibit A were admitted 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 an overnight assistant stock manager and was separated from employment on January 15, 2016, when he was discharged for failure to properly report his absence on January 14, 2016 (Employer's Exhibit One). The employer has an attendance policy, which requires employees notify employers prior to a shift start time of an intended absence. The policy does not contain language that specifies a set number of permissible absences or unexcused absences. The claimant was made aware of the employer's policy at the time of hire and also was responsible for enforcing policy amongst subordinate employees.

The final incident occurred when the claimant visited the doctor around 3:00 p.m. on January 14, 2016. The claimant knew upon completion of the doctor's appointment that he would not be attending work but did not call immediately to report it to the employer. Instead he sat down, took muscle relaxers and woke up at approximately 12:15 a.m.; over two hours after his shift start time. At that time, he called the employer and spoke to Tracy Wise, to inform of his absence. Because the claimant did not properly report the absence, even though he had a doctor's note to excuse his shift (Claimant's Exhibit A), the absence was considered unexcused and he was discharged.

The evidence is disputed as to whether or not the claimant was issued any warnings prior to discharge for attendance and knew or should have known his job was in jeopardy. The employer documented four warnings on February 2, 2016, June 29, 2016, September 23, 2015, and October 15, 2016 (Employer's Exhibit One, Pages Five through Eight). None of the warnings contained the signature of the claimant. The employer prepared written warnings by way of the claimant's immediate supervisor, Tracy Wise, who did not administer the warnings but would turn them into Human Resources, Deb Borwig. Ms. Borwig began work at 4:00 a.m. while the claimant was still at work but would handle her cash counting duties and in her words "would not put on the HR hat until 8:00 a.m." Neither Ms. Borwig nor Mr. Wise ever actually administered the warnings to the claimant or showed the claimant the warnings.

In addition, the claimant denied being verbally counseled by the employer for his attendance or absences. The employer has a general policy about attendance but never issued a warning or specifically told the claimant his job was in jeopardy due to the number of absences or failure to report absences each day. While the employer reported it had issued verbal warnings for attendance, no specific dates or details of incidents triggering the warnings were provided. The employer did speak with the claimant on January 2, 2016 following an argument between the claimant and his daughter, Heather, (who was also an employee and subordinate) after he told her she could not work for the employer, even though he lacked the authority to do so.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,160.00, since filing a claim with an effective date of May 1, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview by way of Jeremy Hayes and Deb Borwig.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(4) and (7) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in

> disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.
>
> (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. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper, supra.*

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 Ct. 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*, 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. *State v. Holtz*, 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 Iowa law.

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, the employer carries the burden of proof in a discharge from employment. Although the claimant was absent without properly reporting to the employer on January 14, 2016, and that absence would generally be considered unexcused, 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 unreported absences without warning or counseling.

The claimant may have known what the policy was for reporting absences, and that he was even violating it at times. However, neither human resources nor the claimant's immediate supervisor administered any warning to the claimant to place him on notice that his job was jeopardy. Given the lack of any specific detail when the employer was asked of dates or events

triggering reported warnings, the administrative law judge finds the claimant's denial of receiving verbal warnings for his attendance to be credible. Further, the administrative law judge is not persuaded in light of the claimant working overnight shifts and in light of Ms. Borwig's multiple job duties, that a warning could not be administered to the claimant to place him on notice that his job was in jeopardy. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. The record does not support that the claimant could have reasonably anticipated that his job was in jeopardy based on the lack of warnings for his attendance history. 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 had good business reasons to discharge the claimant, misconduct under Iowa law has not been established.

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. Since the employer has not met its burden of proof, benefits are allowed.

Benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The June 2, 2016 (reference 03) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits and the employer's account is not relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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