

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIM A ZIRKELBACH

Claimant

APPEAL 16A-UI-12167-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMC ACQUISITIONS INC

Employer

OC: 10/16/16

Claimant: Appellant (2)

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 November 2, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on November 29, 2016. The claimant, Kim Zirkelbach, participated, and witness Jolene Zirkelbach participated. The employer, E.M.C. Acquisitions, Inc., participated through Mark Van Lauwd, human resource manager. Claimant's Exhibits A and B and Employer's Exhibits 1 through 12 were received and admitted into the record without objection.

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, most recently as an assembler, from June 16, 1986, until October 18, 2016, when he was discharged.

Claimant testified that he required a leave of absence from work due to health concerns brought on and exacerbated by his employment. On October 10, claimant requested leave of absence and FMLA paperwork from Van Lauwd. The following day, claimant submitted the requested paperwork asking for a leave of absence until December 5, 2016. (Exhibit B) Van Lauwd testified that claimant had a history of absenteeism in the fall and the spring, due to his farming business. Van Lauwd reviewed claimant's FMLA request and his recent doctor's notes, and he worked with other management to develop a job that he believed claimant could perform. (Exhibit 9) Claimant testified that he believed it would be stressful for him to perform this new assignment, as it was unfamiliar and as it involved a task he avoided whenever possible. Thirty minutes later, claimant approached Van Lauwd and stated he was leaving work.

The following day, claimant presented a doctor's note excusing him from work from October 13 through November 14, when he would need to be seen and reevaluated. (Exhibit 11) After receiving this note, Van Lauwd contacted Dr. Weston, the author of the doctor's note. Van Lauwd testified that the doctor told him claimant had reported different information to him from what Van Lauwd reported. On October 14, based on Van Lauwd's conversation with Dr. Weston, the employer contacted claimant to notify him that it would not accept his doctor's excuse. The employer informed claimant that he needed to report to work the following day as scheduled. On both October 15 and October 17, claimant called in and reported that he would not be at work and he had a note excusing him.

Also on October 17, Van Lauwd had a conversation with one of the union stewards about claimant's employment. When the union steward inquired about claimant, Van Lauwd reported that claimant had enough attendance points accrued to be discharged for absenteeism. Later that day, claimant called in and reported that he would return to work the following day. On October 18, Van Lauwd went to claimant's work bench with a supervisor and notified him that he had accrued sufficient attendance points to be discharged. Claimant was ultimately discharged that same day.

Claimant had received multiple warnings for his attendance. On April 28, 2016, claimant was warned that he had missed too many days of work since 2014. (Exhibit 3) Van Lauwd testified that claimant's absences listed on this document were a combination of unexcused, excused, and approved absences. Claimant was aware that he could lose his job for poor attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. 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(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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "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 excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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 claimant credibly testified about the circumstances surrounding his end of employment. The administrative law judge finds the employer did not provide sufficient evidence refuting claimant's note from Dr. Weston ordering him off work until November 14, 2016. Even if Dr. Weston told Van Lauwd that claimant reported different information from Van Lauwd, that information alone does not undermine the credibility of the note. An employee likely reports less information about a health condition to an employer than a patient does to his doctor.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant had a valid doctor's excuse for his absences on October 15 and 17, and he called and reported these to the employer. Because claimant's last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which

establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The November 2, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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