IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANDREW E LOWE Claimant **COMMUNITY MOTORS COMPANY INC** Employer	**APPEAL 18A-UI-04154-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/11/18** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 28, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on May 17, 2018. Claimant participated personally and through witnesses Tyler Pohlman and Randy Lowe. He was represented by attorney Erin Lyons. Employer participated through service manager David Pruisner and payroll clerk Alisha Boelman. Claimant's Exhibits A and B were received.

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 began working for employer on March 27, 2017. Claimant last worked as a full-time detailer. Claimant was separated from employment on February 13, 2018, when he was terminated.

Employer has an attendance policy stating that if an employee is going to be absent, he must contact his supervisor by the start of the regularly scheduled shift. Employer also has a policy prohibiting harassment. Claimant was aware of the policies.

Toward the end of his employment, claimant was assigned to work at employer's second location Monday through Thursday. Claimant asked service manager David Pruisner if he could pick up extra hours at employer's main location on Fridays. Pruisner agreed. After the conversation, claimant believed his work on Fridays was on a voluntary basis, and that he could come in or leave early as he pleased. However, Pruisner believed the work time on Fridays was mandatory. After the conversation, claimant worked full days on some Fridays, half days on some Fridays, and some Fridays did not come into work at all. Claimant did not consult with any supervisor about his Friday attendance and was not disciplined or told the hours on Friday at the main location were mandatory.

While working at employer's second location, claimant reported to manager George Trovas. Trovas often spoke to employees in an abrasive manner using profanity. Employees working at both locations used profanity in the workplace on a frequent basis without ramification.

Trovas told claimant to report any absences at employer's second location directly to him. Claimant did so.

On Friday, February 9, 2018, claimant worked a half day at employer's main location. Before claimant left for the day, he went into payroll clerk Alisha Boelman's office and confronted her about what he believed were errors on his paycheck. Claimant spoke with a raised voice and said, "Fuck this place," and "This is fucking bullshit." After Boelman explained the pay periods to claimant, he realized there was no mistake and he calmed down and left the office. Boelman reported the incident to service manager David Pruisner. Pruisner went to look for claimant, but he had already left work without putting in a full day.

On Monday, February 12, 2018, claimant did not appear for work due to a shoulder injury. Claimant properly reported the absence to Trovas.

When claimant returned to work on Tuesday, February 13, 2018, he was asked to report to employer's main place of business. Pruisner then terminated claimant's employment.

Claimant had never been previously disciplined for using profanity or behaving in a hostile manner in the workplace.

Claimant had been disciplined for improperly reporting an absence in December 2017, but had several additional absences since that date and had not been further disciplined.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether claimant was terminated for job-related misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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.

In this case, claimant was terminated for two reasons—absenteeism and using profanity and raising his voice in the workplace.

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

Claimant left work early on Friday, February 9, 2018, without seeking approval from a supervisor. However, claimant believed the hours he worked on Friday were strictly voluntary and therefore he was not required to appear for work at all on Fridays, let alone gain permission to leave early. Claimant and Pruisner did not have a "meeting of the minds" on this issue. But claimant had missed work or left work early on the several Fridays preceding the termination, and he was never warned or disciplined for doing so. Therefore, claimant had no reason to believe he would be terminated for leaving work early on Friday, February 9, 2018. Employer has not established claimant's actions in leaving work early that day amount to misconduct.

Claimant was then absent again on Monday, February 12, 2018. However, the absence was due to a medical issue and was properly reported. Therefore, it is considered excused under the law and cannot be considered the basis of a finding of misconduct. Employer has failed to establish claimant's absenteeism disqualifies him from receiving benefits.

Claimant was also terminated for a second reason—his profanity laced outburst directed toward payroll clerk Alisha Boelman on Friday, February 9, 2018. Although claimant denies engaging in this conduct, I do not find his testimony on this point credible. I do find credible the testimony that profanity was part of the workplace culture and that manager Trovas frequently used profanity and spoke with employees in an abrasive manner. Given the workplace culture, I find claimant's conduct was an incident of poor judgment. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. 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.

In summary, while employer may have had good business reasons to terminate claimant, it failed to establish it terminated him for misconduct as defined by the unemployment law.

DECISION:

The March 28, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Decision Dated and Mailed

cal/scn