

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MICHAEL C HAMBRIGHT
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 17A-UI-00951-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/25/16
Claimant: Appellant (1)

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 January 20, 2017, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on February 16, 2017. The claimant participated personally. The employer participated through Maria Villapando, Human Resources Manager. 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.

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: The claimant was employed full-time as a maintenance mechanic and was separated from employment on December 29, 2016, when he was discharged for excessive unexcused absenteeism and tardiness.

The employer has a no fault attendance policy which designates a point value to an employee's absence or attendance infraction. If an employee exceeds 13.5 points in a rolling twelve month period, an employee is discharged, regardless of the reasons for absences. The employer's policy also requires employees notify the employer of absences via a designated telephone number, thirty minutes prior to their shift start time. The claimant was made aware of the employer policies upon hire.

The claimant accumulated points for the following absences:

January 25, 2016	1 point	Absent, illness
February 21, 2016	1 point	Tardy, 2 minutes
March 3, 2016	1 point	Tardy, 40 minutes

March 4, 2016	1 point	Tardy, 1 minute
April 14, 2016	1 point	Tardy, 1 minute
April 15, 2016	1 point	Absent, illness
May 12, 2016	1 point	Tardy, 1 minute
May 20, 2016	1 point	Tardy, 5 minutes
May 23, 2016	1 point	Absent, illness
July 24, 2016	1 point	Tardy, 1 minute
September 2, 2016	1 point	Absent, illness
October 20, 2016	1 point	Absent, illness
November 17, 2016	1 point	Absent, illness
December 5, 2016	1 point	Tardy, 1 minute
December 9, 2016	1 point	Tardy, 26 minutes

The claimant's absences due to illness were properly reported. The claimant did not properly report any of the tardies, which ranged from one minute to forty minutes. The reasons for those absences were due to the claimant running late, being the sole driver in his family or delaying clocking in. The employer determines a tardy based on the time an employee swipes his badge into the timekeeping system and is expected to be at their work station, clocked in, at their start time. The employer was unaware of complaints, other than the claimant, who stated as they tried to clock in on time that the clock would roll over. The claimant was granted a period of FMLA between June 11 through 21, 2016, and no absences or attendance infractions during that time were accumulated. The claimant received warnings on March 9, June 16, July 28 and December 15, 2016 for his attendance points. On December 9, 2016, the final incident occurred, which the claimant stated he was 9 minutes tardy due to going to the casino with his family for a buffet lunch and then his car needing a jump start. Upon arriving to work, he did not clock in immediately but accordingly to him, tried to find a manager for 15 minutes to override his start time because he knew he was in trouble with points. The claimant then met with Ms. Villapando, who offered the claimant FMLA paperwork and 15 points to complete it, in hopes it would excuse some of his absence points, if completed. The claimant's doctor refused to extend or recommend further FMLA and so the points stood, causing the claimant to "point out." He was subsequently discharged.

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.

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.

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 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 30 minute notification of absences, and an excess of 13.5 attendance points in a rolling twelve month period would lead to discharge. The claimant was issued four warnings to alert him that his job was in jeopardy, including March 9, June 16, July 28 and December 15, 2016. Six of the fifteen attendance occurrences were related to properly reported absences. The remaining nine absences were attributed to tardiness, ranging from one minute to forty minutes and for reasons within the claimant’s control, such as running late, transporting family members or repeatedly waiting to clock in until the last minute before his shift started. The final absence, in which the claimant was delayed due to car issues after going to the casino with his family, was not properly reported as he would have known he was running more than one or two minutes late. The claimant’s discharge was only delayed from the final incident, to allow him to preserve his job, if his doctor could support his absences by way of completing FMLA paperwork. Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The January 20, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs