

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DAMIEN J KEAIRNS
Claimant

CONSUMERS SUPPLY DISTRIBUTING LLC
Employer

APPEAL 16A-UI-13859-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/04/16
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 December 20, 2016, (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 January 23, 2017. The claimant participated personally. The employer participated through Cecily Johnston, Human Resources Manager. Claimant's Exhibits A, B, and C were 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.

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 technician and was separated from employment on November 30, 2016, when he was discharged for excessive tardiness and absenteeism.

The employer does not have a written policy containing its expectations regarding attendance and notification of absences. However, the employer stated employees are aware that they are to call in to the employer's designated call in line at least 30 minutes prior to shift start time if they are going to be absent. The employer uses an employee's fob pass, which is swiped for timekeeping, to determine if an employee is tardy.

Prior to separation, and in the claimant's last two months of employment, he was tardy on October 10, 11, 13,14, 18, 19, 20, 21, 31, November 1, 2, 3, 4, 7, 8, 9,10, 11, 15, 16, and 17. The claimant's tardies ranged from four minutes to four hours late for his shift which began at 7:00 a.m. The claimant attributed majority of the tardies to taking his daughter to school and his daughter being sick, which would require him to coordinate childcare. The employer met with the claimant on November 10, 2016, to address the tardiness. The employer offered to push

back the claimant's start time (which would require him then to stay later) so that he would not be late. The claimant declined. The claimant again met with employer on November 17, 2016, because of the continued tardiness and told him his start time would be pushed back to 8:00 a.m. since he could not make it to work on time.

On November 22, 2016, the claimant was experiencing phone difficulties and intended to call off work because he was sick. When he arrived to the facility, he called in from the employer's location, to report his absence at 8:04 a.m. and returned home sick. The claimant properly called off his absence on November 23, 2016 due to illness. The claimant was not scheduled on November 24 through 27, 2016. The claimant called off sick again on November 28, 2016. Ms. Johnston called the claimant and left a message to call her back and that the employer would need a doctor's note to cover his absence. The claimant again called off sick on November 29, 2016 but did not return Ms. Johnston's call. He also visited a doctor that day. On November 30, 2016, the claimant returned to work as scheduled and on time. He forgot his doctor's note at home and asked to return to get it. The employer subsequently discharged him.

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).

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.

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).

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 claimant's absences due to being tardy approximately twenty times in October and November 2016, would be considered unexcused, based on the reasons for the tardies, as childcare and transportation to school are not considered excused. The

administrative law judge is sympathetic to the employer, who clearly tried to work with the claimant by not moving forward with discharge sooner, and even adjusting his schedule by one hour to help him arrive on time. The administrative law judge is persuaded that the claimant's absence due to illness on November 22, 2016 should be considered excused as well, because even though the claimant called in 4 minutes after his shift started, and not 30 minutes in advance, he came to work to report the absence because he was experiencing phone difficulties. The administrative law judge is persuaded the claimant's good faith efforts in light of being ill, cannot be ignored in consideration. The claimant's absences due to illness on November 23, 28 and 29, were properly called off, and attributed due to illness, and therefore excused in the context of this analysis. The employer subsequently discharged the claimant after his absences November 22, 23, 28 and 29, all attributed to illness. The administrative law judge recognizes the strain the claimant's attendance history had the employer, but medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Therefore, the final four absences due to illness and which were properly reported, would be considered excused.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the 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, and, without such, the history of other incidents need not be examined. Accordingly, 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.

DECISION:

The December 20, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs