

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RICHARD D LACY
Claimant

PREMIER MILLWRIGHT INC
Employer

APPEAL 17A-UI-06441-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/04/17
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 20, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 11, 2017. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Shannon Gorman, manager. Employer Exhibit 1 was 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 a millwright laborer and was separated from employment on June 5, 2017, when he was discharged.

The employer does not have a written policy containing its expectations regarding attendance and notification of absences. Since beginning employment, the claimant was absent from work due to court appearances on October 5, 2015, July 26, 2016, August 25 and 26, 2016, and February 24, 2017. He missed work due to car troubles on March 14, 2017. He was absent due to incarceration on February 2, 2017 and was absent due to visits with his attorney on February 3, 2017. He was absent, citing family issues, on March 30, 21 and 22, 2017.

He was absent due to illness of himself, a child or his girlfriend having surgery on October 25, 2015, January 8, 2016, February 1, 2016, April 20, 2016, August 1, 2016, September 20, 2016, October 25, 2016, November 9, 2016, November 17, 18, and 21, 2016, December 12, 2016, January 25, 2017, February 13, 15 and 23, 2017, March 7 and March 13, 2017. All absences for illness were properly reported. Prior to discharge, the employer verbally warned the claimant in February and March 2017, regarding his continued absences. No written warnings were given to the claimant.

The employer was aware that the claimant was continuing to experience personal issues with his family, which also resulted in his incarceration on May 31, 2017, after he allegedly violated a restraining order. He was a no call/no show, and no family member or attorney reported the claimant's absence to the employer. On June 1, 2017, the claimant returned to work. No warning was given for the no call/no show from the day prior. The claimant then left early on June 2, 2017 to tend to family matters. The claimant did not report to work on June 3, 2017. Mr. Gorman asserted the claimant called off sick and the employer's record indicated the claimant was arrested on June 3, 2017 (Employer Exhibit 1). The claimant was scheduled off work on June 4, and when he returned to work on June 5, 2017, he was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,320.00, since filing a claim with an effective date of June 4, 2017. The administrative record also establishes that the employer did participate in the June 19, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not 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).

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 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 witness 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.

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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. See 871 IAC 24.32(4).

The administrative law judge is sympathetic to the employer, who clearly tried to work with the claimant by not moving forward with discharge sooner. The crux of this case rests on whether the final absence on June 3, 2017 should be considered an excused absence. In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence.

The employer in this case offered conflicting reasons for the claimant's final absence on June 3, 2017. The employer does not dispute that the claimant reported the absence (versus being a no call/no show). Mr. Gorman asserted the absence was due to the claimant being sick. The employer's documentation (Employer Exhibit 1) references the claimant being arrested as the reason the claimant was absent from his shift. The administrative law judge recognizes the strain the claimant's attendance history had on 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). If the claimant's last absence was in fact related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct.

The employer was further unable to provide any specific information regarding the possible arrest that occurred on June 3, 2017 and prevented the claimant from performing work. The claimant did not attend the hearing and therefore could not verify if he was in fact arrested, why he was arrested, any charges against him, or the disposition of any charges related to the arrest. Being arrested or incarcerated at a time that conflicts with a work schedule is not automatically considered an unexcused absence. Rather, "[I]nvoluntary incarceration, at least where the charges are dismissed, also falls within the 'other reasonable grounds' for absence contemplated under rule 871—24.32(7)" *Irving v. EAB*, 883 N.W.2d 179 (Iowa 2016). In the absence of credible information about whether the claimant was sick or incarcerated for his final absence, (including details of any incarceration), the administrative law judge is unable to conclude that the claimant's final absence should be treated as unexcused. The only information provided was that it was properly reported.

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. 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.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The June 20, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The claimant is not overpaid benefits. The employer is not relieved of charges associated with this claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn