

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTOPHER D DOWELL
Claimant

APPEAL 16A-UI-09467-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**RIVER VALLEY TRANSPORTATION
SERVICES**
Employer

**OC: 06/26/16
Claimant: Appellant (2)**

Iowa Code § 96.6(2) - Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the July 21, 2016 (reference 01) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on September 16, 2016. The claimant, Christopher D. Dowell, participated personally. The employer, River Valley Transportation Services, participated through Office Manager Sara Phillips. Employer's Exhibits 1 and 2 were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance file.

ISSUES:

Is the employer's appeal is timely?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A decision disallowing unemployment insurance benefits to claimant was mailed to claimant's last known address of record on July 21, 2016. The hearing notice stated "This decision becomes final unless an appeal is postmarked by 07/31/16, or received by Iowa Workforce Development Appeal Section by that date. If this date falls on a Saturday, Sunday, or legal holiday, the appeal period is extended to the next working day." The claimant never received this decision. Claimant filed an appeal through the online system on August 29, 2016 after he received notification of an overpayment of benefits.

Claimant was employed full-time as an outside parts salesman. He was employed from March 2, 2003 until May 6, 2016. Claimant's job duties included assisting customers and delivering parts. Jason Stanbary was claimant's immediate supervisor.

The employer does not have a written attendance policy; however, claimant was verbally notified by the employer that if he was going to be absent from work to call in and advise the employer of his absence prior to his scheduled shift beginning. Claimant had received a three day suspension in August of 2015 for delivering parts to the wrong customer, writing incorrect information from the customer down and for leaving the van running. See Exhibit 2. Claimant received a three day suspension in March of 2016 for writing down incorrect purchase numbers and pulling the wrong parts for customers. Claimant was never told at this time that his suspension was due, in part, to his tardiness.

On April 30, 2016 claimant was tardy to work due to oversleeping. Claimant did not call the employer prior to his scheduled shift beginning to notify it that he would be tardy. Prior to April 30, 2016 claimant was tardy to work at least three times per month for either oversleeping or no reason. The employer had a policy in place which provided for bonuses to employees if they were not late to work more than three times in one month. Claimant had not received his monthly bonus since July of 2015. No specific dates regarding claimant's tardiness were provided by either party.

Claimant did not receive any discipline for his tardiness. Claimant believed that the only repercussion for being tardy would be loss of his bonus and not discharge from employment. Claimant was ill on May 3, 4, and 5, 2016. Claimant called and reported his illness to the employer prior to his shift beginning on each date. Mr. Stanbary went to claimant's house and knocked on his door when he was ill. Claimant was in the bath and did not answer the door.

Claimant was discharged by Mr. Stanbary on May 6, 2016. Claimant was given no reason for why he was being discharged. Claimant believes that he was discharged because Mr. Stanbary did not believe he was at home ill on May 3, 4, and 5, 2016 when he called in sick and was absent.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an

appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the overpayment decision, which was the first notice of disqualification. The claimant filed an appeal within a reasonable period of time after discovering the disqualification. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant's separation from employment was a discharge or a voluntary quit. 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's testimony more credible than Ms. Phillips' testimony.

The administrative law judge concludes the separation was a discharge.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

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

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982).

Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

In this case the claimant properly reported his absences due to illness on May 3, 4, and 5, 2016. These absences are excused and do not amount to misconduct.

Claimant admitted that he was tardy to work at least three times per month since July of 2015. The employer has a policy in place wherein an employee does not receive their monthly bonus if they are tardy to work on more than three occasions per month. Claimant's tardiness was due to oversleeping or simply arriving late for no reason.

However, claimant had not received any discipline from the employer regarding his tardiness. While it is true that claimant did not receive his monthly bonuses due to tardiness, this is not discipline. Claimant was never notified by the employer that his *job was in jeopardy* if he continued to be tardy to work. In fact, this level of tardiness was allowed by the employer for over a year without discipline. Claimant might even infer employer acquiescence after multiple months elapsed without warning or counseling regarding his tardiness.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. 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.

The employer has failed to establish that the claimant was discharged for a current act of job-related misconduct which would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The claimant's appeal is timely. The July 21, 2016 (reference 01) unemployment insurance decision denying benefits 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.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

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