IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MITCHELL A BENNETT Claimant **HY-VEE INC** Employer	**APPEAL 22R-UI-01592-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/21/21** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On June 28, 2021, Mitchell Bennett (claimant/appellant) filed an from the Iowa Workforce Development decision dated June 3, 2021 (reference 02) that disqualified claimant from receiving unemployment insurance benefits based on a finding he was discharged on April 2, 2020 for excessive unexcused absenteeism after being warned.

A telephone hearing was held on August 20, 2021 in front of Administrative Law Judge Michael Lunn. The parties were properly notified of the hearing. The claimant participated personally. His mother, Sherry Lucas, participated as a witness. Hy-Vee Inc (employer/respondent) participated by HR Rep. Liz McMahon and was represented by Erin Bewley. No exhibits were offered or admitted. Official notice was taken of the administrative record.

A decision was issued on September 16, 2021, finding claimant's appeal of the June 3, 2021 decision was untimely and the decision denying benefits therefore remained in force. Claimant appealed the decision to the Employment Appeal Board (EAB), which reversed the finding that the appeal was untimely and remanded for issuance of a decision on the merits of the case.

The EAB advised in its decision that it was within the administrative law judge's discretion whether to conduct an additional hearing in the event issues were not adequately addressed in the record made in the August 20, 2021 hearing. The administrative law judge, having reviewed the record of the August 20, 2021 hearing, determines the relevant issues were adequately addressed in that record and that an additional hearing is unnecessary.

ISSUE:

I. Was the separation from employment a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant most recently began working for employer on January 2, 2020. Claimant worked for employer as a part-time pharmacy technician. The last day claimant worked on the job was April 2, 2020. Claimant's immediate supervisor was Pharmacy Manager Hamid Azziz until approximately March 23, 2020, when Azziz was discharged. Claimant separated from employment on April 11, 2020. Claimant was discharged on that date.

Claimant was discharged due to absenteeism. Employer's attendance policy requires employees to contact their supervisor before a shift is to begin to report an absence. The most recent incident leading to discharge occurred on April 11, 2020. Claimant was scheduled to work on that date but did not appear for work on that date. Claimant had previous absences on March 10, 11, and 13, 2020. He received a written warning on March 14, 2020 that warned future instances may result in discharge. He was also written up on February 8, 2020, due to being late for a scheduled shift.

Claimant was working full-time as a pharmacy technician at Walgreens during the same period he was employed with employer. Azziz was aware at the time of hire that claimant was also working at Walgreens and his Hy-Vee schedule would need to accommodate that. The understanding was that claimant would let Azziz know his schedule for Walgreens and Azziz would then schedule him at Hy-Vee accordingly. However, Azziz would often schedule claimant during times that conflicted with his schedule at Walgreens. This is what caused claimant to be absent from shifts at Hy-Vee.

Claimant offered credible, first-hand testimony that he always notified employer when he was going to be absent for a shift and that his absences were due to scheduling conflicts. McMahon testified that claimant did not properly report the absences which led to his discharge. However, McMahon was not the HR representative overseeing claimant's location at the time in question and had no direct knowledge of these communications. Furthermore, no testimony or statements from Azziz were offered into the record to support employer's contention that the absences were unreported. Neither did employer provide written documentation in support the contention. The administrative law judge finds claimant's testimony on this point to be more reliable and finds he did properly report the absences and they were due to scheduling conflicts caused by employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the decision dated June 3, 2021 (reference 02) that disqualified claimant from receiving unemployment insurance benefits based on a finding he was discharged on April 2, 2020 for excessive unexcused absenteeism after being warned is REVERSED.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 provides in relevant part:

> 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 bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 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).

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).

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. Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

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*.

Claimant credibly testified that he always notified employer when he was going to be absent for a shift and that his absences were due to scheduling conflicts. McMahon testified that claimant did not properly report the absences which led to his discharge. However, McMahon was not the HR representative overseeing claimant's location at the time in question and had no direct knowledge of these communications. Furthermore, no testimony or statements from Azziz were offered into the record to support employer's contention that the absences were unreported. Neither did employer provide written documentation in support the contention.

The administrative law judge finds claimant's credible, first-hand testimony as to the reasons for and circumstances surrounding his absences to be more reliable than the second-hand evidence offered by employer. The administrative law judge therefore finds claimant's absences were properly reported and were for reasonable grounds. Those grounds are employer scheduling claimant during times that conflicted with his Walgreens schedule, in contravention of the scheduling arrangement claimant and employer made at the time of hire.

Because the administrative law judge finds claimant's absences were properly reported and for reasonable grounds, the absences did not constitute misconduct and employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). Benefits are therefore allowed, provided claimant is not otherwise disqualified or ineligible.

DECISION:

The decision dated June 3, 2021 (reference 02) that disqualified claimant from receiving unemployment insurance benefits based on a finding he was discharged on April 2, 2020 for excessive unexcused absenteeism after being warned is REVERSED. The separation from employment was not disqualifying. Benefits are allowed, provided claimant is not otherwise disqualified or ineligible. Employer's account is subject to charge.

Andrew B. Duffelmeyer
Administrative Law Judge
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March 1, 2022
Decision Dated and Mailed

abd/abd