IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TRACI CARNICLE Claimant **EXIDE TECHNOLOGIES** Employer	**APPEAL 17A-UI-11929-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/25/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 16, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 12, 2017. Claimant participated. Travis Ridenaure participated on claimant's behalf. Employer did not register for the hearing and did not participate. Claimant Exhibit A was admitted into evidence with no objection.

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: Claimant was employed full-time as a farmer helper from September 21, 2012, and was separated from employment on November 1, 2017, when she was discharged. On November 1, 2017, the employer told claimant she was discharged due to insubordination. The employer told claimant she was discharged for two reasons: not working all of her overtime on October 14, 2017 and October 28, 2017 and not marking straps on some batteries on October 28, 2017.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Claimant Exhibit A. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. Claimant Exhibit A. Claimant was aware of the employer's policy. Claimant Exhibit A.

On Wednesday, October 11, 2017, the employer informed claimant there was mandatory overtime on Saturday, October 14, 2017 from 6:45 a.m. to 6:45 p.m. During the week of October 9, 2017, claimant was scheduled to work overtime every day, but her supervisor sent her home at 2:45 p.m. every day. During that week, claimant went to the office and a manager told her that if she left at 2:45 p.m. instead of working until 6:45 p.m. on Saturday, October 14, 2017, she would receive 1.5 attendance points for leaving early. On October 14, 2017, claimant worked from 6:45 a.m. to 2:45 p.m. Claimant left at 2:45 p.m. instead of working until 6:45 p.m.

When claimant left at 2:45 p.m., she did not inform the employer she was leaving early. Claimant assumed she was going to be sent home at 2:45 p.m., like she had been all week.

On October 24, 2017, claimant had a discussion with the plant manager regarding her overtime for that week. Claimant Exhibit A. The plant manager was aware that claimant had left early on Saturday, October 14, 2017. The plant manager told claimant that she did not have to work past her first shift hours (6:45 a.m. to 2:45 p.m.) for that week. Claimant Exhibit A. On Wednesday, October 25, 2017, the employer informed claimant there was mandatory overtime on Saturday, October 28, 2017, but claimant understood the overtime was just working on Saturday; it was her regular first shift hours (6:45 a.m. to 2:45 p.m.). On October 28, 2017, claimant worked from 6:45 a.m. to 2:45 p.m. During claimant's shift, she was responsible for marking straps on certain batteries. On each battery that claimant was supposed mark straps, she did mark straps. Claimant denied that she failed to mark straps on batteries. Mr. Ridenaure was claimant's coworker and worked close to her. Mr. Ridenaure has to trust that claimant is performing her job and he did not have any issues with claimant's job performance. Claimant left at 2:45 p.m. on October 28, 2017, instead of working until 6:45 p.m. When claimant left at 2:45 p.m., she did not inform the employer she was leaving early.

On Monday, October 30, 2017, the plant supervisor told claimant she had to leave because she was not doing her job. Claimant went and spoke to the plant manager. The plant manager told claimant they would figure out what was going on, but told her to go home until the employer contacted her. Claimant asked why she was not getting a disciplinary warning. Claimant did not work on October 31, 2017. On November 1, 2017, the employer informed her she was discharged for insubordination.

On October 14, 2017, claimant was only at one attendance point, but when she was discharged on November 1, 2017, the employer had her at seven attendance points. Claimant had no disciplinary warnings for absenteeism in the past twelve months. The employer gave claimant three attendance points for leaving early October 14, 2017 and three attendance points for leaving early on October 28, 2017.

Claimant had no prior disciplinary warnings regarding her job performance. Claimant had no prior disciplinary warnings for failing to mark straps on batteries. Claimant's last disciplinary warning occurred approximately two years ago for absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).). 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* at 192. Second, the absences must be unexcused. *Cosper* at 10. 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. 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, supra.*

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer did not present any evidence or testimony at the hearing. Claimant provided credible, first-hand testimony that during the week of October 9, 2017, the employer informed her she would only receive 1.5 attendance points for leaving early on October 14, 2017. Claimant also provided credible, first-hand testimony and evidence that on October 24, 2017, she was told by the plant manager that she only had to work her first shift hours that week, which included Saturday, October 28, 2017. *See* Claimant Exhibit A. Claimant further provided credible, first-hand testimony that on October 28, 2017, she did mark straps on all of the batteries that she was supposed to.

The employer did not provide any evidence or testimony at the hearing and, therefore, did not provide sufficient evidence of job-related misconduct to rebut claimant's denial of said conduct. "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." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

Furthermore, claimant provided credible, first-hand testimony that when she was discharged on November 1, 2017, she only had seven attendance points. Although, an employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged claimant contrary to the terms of its own policy, which does not call for termination until after ten points are accumulated. It is also noted that claimant's last warning for absenteeism occurred approximately two years ago. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. 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. Thus, since the consequence of discharge was more severe than other employees would receive for similar conduct by the terms of the policy, the disparate application

of the policy cannot support a disqualification from benefits. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

DECISION:

The November 16, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs