

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOBY R BEAVERS
Claimant

SMITH CO MFG INC
Employer

APPEAL 20A-UI-15668-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/20/20
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Joby R Beaver, the claimant/appellant, filed an appeal from the November 18, 2020, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 27, 2021. Mr. Beavers participated and testified. The employer participated through Teressa Bleil, human resource manager and Edgar Davila, supervisor.

ISSUES:

Was Mr. Beavers laid off, discharged for misconduct or did he voluntarily quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Beavers began working for the employer on March 3, 2020. He worked as a full time welder. His last day of work was August 9, 2020 when he was separated from employment for too many absences.

The employer's policy provides that an employee will be docked 0.5 points for being late 30 minutes or less, 1 point for being late more than 30 minutes but less than 2 hours, and 2 points for being late more than 2 hours or being absent without an excuse. Four points result in a verbal warning, 6 points result in a written warning, 9 points result in a final written warning and more than 10 points may result in termination of employment. An employee may use paid-time-off (PTO) for an absence or tardiness. If an employee does so, the employee is not docked any points. An employee who calls in sick must provide a doctor's note, otherwise, the absence is unexcused and the employee is docked 2 points. Mr. Beavers acknowledged receiving the policy on March 3, 2020. The employer ran attendance reports about once a week that showed each employees points.

Mr. Beavers was late or absent several times. He was given a verbal warning on July 15 for absences/tardiness on July 2, 7, 8, 10, 13, 14 and 15. He had been docked 4.5 points by this

date. Mr. Beaver was given a written warning on July 21 for absences/tardiness on July 16 and July 21. He had been docked 6.5 points by this date.

On August 3, Mr. Beavers was sick with a stomach bug. He called the employer and left a voice message telling them he was sick and wouldn't be at work. Mr. Beavers was sick again on August 4. He again called the employer and left a voice message telling them he was sick and wouldn't be at work. Mr. Beavers did not go to the doctor either day. When Mr. Beavers returned to work, the employer asked him for a doctor's note. He told the employer that he did not have a doctor's note since he did not go to the doctor. On August 11, Mr. Beavers was given a final written warning for the August 3 absence only. He had been docked 8.5 points by this date. Mr. Beavers was warned that any further absences could result in termination of his employment.

The morning of September 2 Mr. Beavers learned from his probation officer that the \$20,000.00 bond in his criminal case had been revoked, the police knew where he worked and to be prepared for the possibility of being arrested at work that day. Mr. Beavers told Mr. Davila, his supervisor, and Ms. Bliel, that he believed he would be arrested that day and asked to leave work at noon to talk with his criminal defense lawyer about the situation. Mr. Beavers told the employer that he could be away from work for about two hours while his lawyer helped him or if he couldn't leave work early he was not sure how long he would be away from work after an arrest. The employer told Mr. Beavers that he could not leave work early.

At about 2:30 p.m., the shop supervisor told Mr. Beavers the police had arrived. The shop supervisor told Mr. Beavers to get his legal situation taken care of and that they would talk when Mr. Beavers was out of jail. Mr. Beavers was then arrested. Mr. Beavers did not attend work on September 3 or September 4 due to being incarcerated. He did not call in either day.

Mr. Beavers was released from incarceration on September 4 after 1:00 p.m. and called the employer to let them know. September 7 was a holiday and the employer was closed. Mr. Beavers returned to work on September 8 and worked his usual shift. Mr. Beavers returned to work again on September 9 and worked his usual shift. Ms. Bliel initially did not know that Mr. Beavers was at work that day. When she found out, she ran the attendance report and saw that Mr. Beavers had gotten over 10 points on August 4. After he clocked out on September 9, Ms. Bliel called Mr. Beavers' in the office and told him that his employment was terminated effective that day due him having more than 10 points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Mr. Beavers was discharged from employment due to job-related misconduct.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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. See Iowa Admin. Code r. 871 – 24.32(7). However, excessive absences are not considered misconduct unless unexcused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). For example, 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); *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

The findings of fact show how the administrative law judge has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience.

In this case, Mr. Beavers' August 3 and August 4 absences were not misconduct. He was sick and he called in both days. Therefore, the points assessed to him by the employer for those days do not count for this analysis even if those absences violated the employer's policy. That means for this analysis Mr. Beavers had been docked 6.5 points before his September 3 and September 4 absences. Mr. Beavers did not call in before his absences on September 3 and September 4. As a result, Mr. Beavers' points totaled 10.5. Despite several warnings, Mr. Beavers continued to miss work without calling in. This is disqualifying misconduct. Benefits are denied.

DECISION:

The November 18, 2020, (reference 01) unemployment insurance decision is affirmed. Mr. Beavers was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Daniel Zeno
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February 16, 2021
Decision Dated and Mailed

dz/scn