IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DEANGELO M MCGREGOR Claimant **HY-VEE INC** Employer	**APPEAL 20A-UI-00314-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/08/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Deangelo M. McGregor, filed an appeal from the December 31, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 6, 2020. The claimant participated personally. Kyle Neal and DeVaughn Jenkins testified upon request of the claimant. The employer, Hy-Vee Inc., participated through Lisa Harroff, hearing representative for Corporate Cost Control. Employer witnesses included Mike Whitten, Michelle Millang and Dean Hepker.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-13 were admitted into evidence. 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.

Note to claimant: Additional information about food, housing, and other resources, can be found by dialing 211 or at www.211iowa.org .

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: The claimant was employed full-time as a service worker beginning in 2016 and was separated from employment on December 10, 2019, when he was discharged (Employer Exhibits 1-2).

The claimant worked in a baking manufacturing unit and his shift began at 10:00 p.m. As a food production facility, the employer needed all employees to be on the line and so it had the "10:10" rule. If an employee arrived more than ten minutes late to the 10:00 p.m. shift, they were sent home for the shift, without pay, and the absence would be counted as unexcused for disciplinary purposes. The employer also implemented a written attendance policy on February 1, 2019, which the claimant signed (Employer Exhibit 5). Employees were expected

to call and notify management if unable to work, but the employer did not specify how much notice was required. In addition, if an employee was absent for three consecutive shifts due to illness, the employer would request medical documentation. The employer reported the rule was in place for safety purposes to prevent sick people from being on the food production line.

The claimant most recently was warned for his attendance on November 11, 2019 (Employer Exhibit 11) and was issued a five-day suspension including November 14, 19, 20, 21, and 24, 2019 (Millang testimony). His warning stated that if he missed work or left early again in the next 30 days, that he could be discharged (Employer Exhibit 11).

Prior to November, the employer reported the claimant had a verbal warning in May 2019, a written warning (which the claimant disputed as being removed) in August 27, 2019, and a suspension for attendance August 27, 28, 29, September 1 and 2, 2019. The employer reported the claimant had used 28 "sick" days (which included oversleeping four times), 15 vacation days and 5 days of suspension between August 2019 and his discharge.

After being suspended on November 24, 2019, the claimant reported absent due to illness on November 26 and December 3, 4, 5, 2019. He properly reported the absences. He went to the doctor and had a doctor's note to bring the employer. He forgot the doctor's note on December 8, 2019 and Mr. Hepker allowed him to work on the line. On December 9, 2019, once the employer realized it had allowed the claimant to work without medical release, it called him and reminded him to bring the note on December 9, 2019. The claimant placed the doctor's note in his coat pocket after the call. Due to a snow storm, the claimant switched which coat he was going to wear and forgot to move the doctor's note from one coat to the other. As a result, he showed up to work without the note.

Mr. Hepker confronted the claimant about not producing the note, and their conversation was overheard by Mr. Neal and Mr. DeVaughn. The claimant explained he could not go home and make it back in time for the 10:10 rule. Mr. Hepker told the claimant that if he let the claimant come back to work without the note, he (Mr. Hepker) would get in trouble. The claimant was sent home. The employer considered the absence to be unexcused and discharged him for having another unexcused absence following his suspension.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a.

Iowa Admin. Code r. 871-24.32 provides, in relevant part:

> Discharge for misconduct.
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> (1) Definition.
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> 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.
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> …
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> (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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. 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). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there has 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*. Assessing the credibility of the witnesses 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 the claimant and his witnesses' testimony to be more consistent and credible than the employer. 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.

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 claimant had four absences upon being suspended for his attendance. All four absences were due to illness and properly reported. 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). Cognizant of the employer's rule regarding medical documentation for extended absences is for public safety, it cannot be ignored that the employer did not follow its own rule by allowing the claimant to work on December 8, 2019 without documentation clearing him.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The claimant made a good faith effort to bring the requested doctor's note on December 9, 2019 when requested, but failed to move it to his other coat. When confronted by the employer, he was faced with returning home during a snowstorm, producing the note and then being told he could not work because it was after 10:10 (and being sent home), being sent home because he did not produce the note, even though the employer allowed him to work the prior shift without a note and without issue, or allowing the claimant to work and produce the note for the next shift. The administrative law judge found that under the circumstances, the claimant has established good cause for his noncompliance on December 8, 2019 and that his being sent home was due to the employer's error to failing to obtain the doctor's note on December 8, 2019 before allowing him to return to the line. The administrative law judge determines this absence should be considered excused as the reason was for reasonable grounds. Because the absence was due to other "reasonable grounds", the administrative law judge concludes the claimant's final absence would be considered excused for purposes of determining unemployment insurance benefits eligibility.

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.

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. Because the last absence was related to properly reported illness or *other reasonable grounds,* no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since 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.

DECISION:

The unemployment insurance decision dated December 31, 2019, (reference 01) is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge
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Decision Dated and Mailed

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