IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOSEPH C UHLMASIEK Claimant **BL RESTAURANT OPERATIONS LLC** Employer	**APPEAL 15A-UI-09101-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/12/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 3, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination he voluntarily quit his employment when he failed to call in or show up for work for three consecutive days. The parties were properly notified about the hearing. A telephone hearing was held on August 31, 2015. Claimant Joseph Uhlmasiek participated on his own behalf. Witness Josh Johnson participated in the hearing at the claimant's request. Employer BL Restaurant Operations LLC participated through General Manager Brian Matis.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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 line cook beginning March 7, 2015, and was separated from employment on July 18, 2015. The claimant was unable to report to work on July 16, 2015 due to a family emergency. He contacted his supervisor Josh Johnson and General Manager Brian Matis who approved his absence.

The claimant drove back from Texas the following day. He arrived home three hours before his shift and contacted Johnson to notify him that he would be in to work. The claimant fell asleep and woke up at 10:30 p.m. He had missed calls and texts from Matis. He contacted Matis and promised he would be in to help close the kitchen. The claimant fell back asleep. The last text message he received from Matis on July 17, 2015 stated the claimant was not being terminated, but if he did not make it into work he knew what would happen next. The claimant responded to Matis' text message apologizing the following morning saying he had fallen back asleep. Matis did not respond to the claimant's text message.

The employer has a one-day no-call/no-show policy. The claimant did not report for his July 18, 2015 shift as he determined between the policy and Matis' lack of response to his absence on July 17 that his job had been terminated.

The claimant had two previous attendance occurrences. On June 30, 2015, the claimant missed part of his shift when he left due to an issue with another employee, but returned to assist in closing the kitchen. On July 11, 2015, the claimant was one hour late to work. Both times Matis reiterated that the claimant needed to report to work.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since the employer has a verbal one-day no-call/no-show policy and claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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(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 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 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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.*

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. The claimant did not notify his employer he would be absent on July 17. On the contrary, he reported he would be at work, but then fell asleep. A reasonable person in the claimant's situation would believe he had been terminated prior to his July 18 shift. The claimant received a text message from Matis indicating he knew what would happen next if he did not arrive to work on July 17th and both parties agreed there was a one-day no-call/no-show termination policy. Additionally, Matis did not respond to the claimant's text message apologizing for falling asleep the second time.

A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. The only other shift the claimant missed entirely was a properly reported absence due to a family emergency. Because his absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

In the alternative, if the claimant's unexcused absences were excessive, the employer had not previously warned claimant that further unexcused absences would result in his termination. The employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. Benefits are allowed.

DECISION:

The August 3, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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