

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GRANT M KORTE**  
Claimant

**APPEAL 19R-UI-01658-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SOVERN CONSTRUCTION & HOME  
CENTER**  
Employer

**OC: 12/09/18  
Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Absenteeism  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 28, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 12, 2019. Claimant participated and testified. Employer participated through Office Manager Kim Meyer. Employer's Exhibits 1 through 3 were received into evidence.

**ISSUES:**

Was the claimant discharged for disqualifying work-related misconduct?  
Has the claimant been overpaid benefits?  
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on May 14, 2018. Claimant last worked as a full-time carpenter. Claimant was separated from employment on December 6, 2018, when he was discharged.

The employer has an attendance policy in place, which provides that more than six tardies or 12 absences in a 12-month period is considered excessive. Claimant received a copy of this policy upon his hire and again on July 19, 2018. The employer's records indicate claimant was late to work on August 29, September 5, November 5, and November 9. Claimant could not recall if he was late those days or why. Claimant was also late to work on November 15 and 16 and received a warning regarding his attendance. (Exhibit 1). The employer's records also indicate claimant was absent from work due to illness on May 16 and June 27 through 29.

On November 19, 2018 claimant was late to work and was again written up. (Exhibit 2). The warning advised further incidents could result in termination. Claimant testified he was late to work that day, but it was because he had a doctor's appointment. Claimant further testified he notified his two foremen and the business owner, Chad Sovern, that he would be late because of the appointment. According to claimant, after his appointment, he brought in a medical excuse taking him off work through November 21. Meyer testified she had spoken to Sovern, who could not recall claimant telling him about the appointment. Meyer was not sure about what, if anything, claimant told his foremen. Meyer could not find a record of claimant's doctor's note, but acknowledged he did not work for the period in question and it was possible the note was misplaced.

The final incident occurred on December 5 and 6, 2018. Meyer initially testified claimant was late to work on December 5, but was not sure what time he had arrived. Meyer later indicated that, based on the final disciplinary action, it appeared claimant arrived to work at 8:09 a.m. on December 5 and 6, 2018. (Exhibit 3). Meyer acknowledged this determination was based on information she received from claimant's foreman, as employees do not punch in. Claimant made this denial both at the time of the hearing and in his final disciplinary action. The foreman also reported claimant's workmanship and attitude were both failing to meet expectations, though claimant had not received any prior warnings or disciplinary actions regarding those issues. Claimant denied he was late either day.

The claimant filed a new claim for unemployment insurance benefits with an effective date of December 9, 2018. The claimant filed for and received a total of \$4,785.00 in unemployment insurance benefits for the weeks between December 16 and March 2, 2019. Both the employer and the claimant participated in a fact finding interview regarding the separation on December 26, 2018. The fact finder determined claimant qualified for benefits.

#### **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.

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(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 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). Excessive absences are not considered misconduct unless unexcused. 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. The claimant's testimony was based on his own first-hand knowledge, while the employer relied on information from second-hand witnesses, which was at times, incomplete. Furthermore, the claimant's testimony remained consistent throughout the hearing and was also consistent with the information contained within the exhibits. The employer's testimony, on the other hand, was inconsistent throughout the hearing and with the information contained in the exhibits. Specifically, the employer's recollection regarding the date of the final tardy changed throughout the hearing and was not consistent with the exhibit, which indicates the final tardy occurred on December 6, 2018. Claimant denies he was tardy on December 5 or 6. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As benefits are allowed, the issues of overpayment and participate are moot.

**DECISION:**

The December 28, 2018, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs