

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SAMUEL E MILLIGAN
Claimant

HALF PRICE BKS/RCDS/MAG INC
Employer

APPEAL 17A-UI-07396-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/18/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused 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 July 14, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 8, 2017. The claimant did not participate personally, but Kate Milligan, mother of claimant attended the hearing. The employer participated through Dawn Orvis, store manager. Department Exhibit D-1 was received into evidence.

Prior to the hearing, the claimant requested the hearing be canceled as he did not intend to apply for benefits and had requested to cancel his claim (Department Exhibit D-1). The claimant's request to cancel his claim was denied (See reference 03 decision), and therefore has a valid claim. **Note to claimant:** If you have moved or changed your mailing address, please log on and update records for all future IWD correspondence.

The administrative law judge took official notice of the administrative records including the fact-finding documents. 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.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 bookseller and was separated from employment on May 25, 2017, when he was discharged.

The employer has a policy which permits employees to accrue and use nine days of sick time each year. Employees also have vacation time to cover absences, but cannot apply vacation time to absences related to illness, unless the employee is also on an approved leave of absence. The employer allows a leave of absence for employees who may not qualify for a Family and Medical Leave Act (FMLA) leave. The claimant received and acknowledged receipt of employer policies regarding attendance at the time of hire (Fact-finding documents). On January 23, 2017, the claimant was issued an attendance/tardy action plan because he had used up his accrued sick time (for absences on January 6, 10, 11, 17, 20 and 22). The claimant was informed that he would be on the plan for six months and would have to provide a doctor's note for any absence related to illness and that he could have one occurrence in the next six months before discharge (Fact-finding documents.)

The claimant had no absences in February. The claimant had one excused absence in March, with adequate sick time to cover. On March 30, 2017, the claimant misread the schedule, causing him to be 1 hour tardy. The tardy was his first unexcused absence and he was issued a final written warning in response (Fact-finding documents). The claimant was absent on April 13, 2017 but had adequate sick time to cover the absence. Ms. Orvis met with the claimant on April 22, 2017 to make him aware that he was out of sick time. On May 2, 2017, the claimant left early but had adequate sick time to cover the absence so it was excused. The claimant then properly reported his absence on May 24, 2017, due to illness. Because he exceeded his sick time and had a second occurrence under the action plan, he was discharged.

The claimant has a diagnosis of anxiety and depression, which contributed to the majority of his absences at the employer. He had two "unexcused absences" after his January 23, 2017 warning; one for tardiness on March 30, 2017, and on May 24, 2017, when he called to report his absence due to illness. The claimant did not request any accommodation due to his medical condition and twice declined to apply for a leave of absence.

The administrative record reflects that claimant has a weekly benefit amount of \$231.00 but has not received benefits since filing a claim with an effective date of June 18, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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).

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 that 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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“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 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). The claimant had two absences not covered through sick time/vacation time after his warning on January 23, 2017, which notified him that he was out of sick time. The claimant was tardy on March 30, 2017 after reading the schedule incorrectly. This absence would be considered unexcused. The claimant's absence on May 24, 2017, was properly reported and due to illness and therefore excused in the context of this analysis. The administrative law judge is sympathetic to the employer, who clearly tried to work with the claimant, by offering a leave of absence, and whose absences (whether covered by sick time or not), would have impacted business. The administrative law judge recognizes the strain the claimant's attendance history had on the employer, but 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). An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits, and because a properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act, the administrative law judge concludes the claimant had one unexcused absence on March 30, 2017.

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 to separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot. (At this time, the claimant had not received any benefits.)

DECISION:

The July 14, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn