

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**LESLIE ORTIZ GONZALEZ**

Claimant

**APPEAL 16A-UI-13529-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PILOT TRAVEL CENTERS LLC**

Employer

**OC: 11/20/16**

**Claimant: Respondent (2)**

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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 December 14, 2016, (reference 05) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged for no disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on January 13, 2017. The claimant, Leslie Ortiz Gonzalez, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, Pilot Travel Centers, L.L.C., participated through Judd Huff, general manager; Amy Meidema, retail sales specialist; and Chris Dugan, shift lead. The administrative law judge took official notice of the administrative record, the fact-finding documentation, and the record of claimant's unemployment insurance benefit payments.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full time, most recently as a deli production employee, from June 28, 2016, until November 14, 2016, when he was discharged for excessive absenteeism. Claimant last reported to work on November 5, 2016. On November 6, claimant was absent. The employer was not certain if he called in or not that day. Claimant was also absent on November 7, 2016, and the employer was not certain whether he called in that day either. Claimant was then a no-call/no-show for his shifts on November 9, 11, 12, 13, and 14. Meidema testified that she recalled claimant calling in, and she directed him to talk to Dugan, who was his supervisor. Claimant called on one occasion prior to 8:00 a.m., and Meidema directed him to call back around 9:00 a.m., when Huff would be working. Huff testified claimant never called back and

spoke to him. Dugan testified that he spoke to claimant after he was absent three days. Dugan instructed claimant that he needed to speak to Huff before he returned to work, as was the employer's policy if an employee missed three consecutive shifts. Claimant never called Huff to discuss returning to work. Claimant received a warning for his attendance in October 2016.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$0.00, since filing a claim with an effective date of November 20, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification. The fact-finding documentation indicates the employer representative requested to use its written statement in lieu of participation in the hearing. While the employer representative provided the name and telephone number of a firsthand witness for rebuttal, the fact-finder was unable to reach that witness or reach the representative.

### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for excessive, unexcused absenteeism. Benefits are withheld.

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.

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. 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. However, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment. Claimant's final absence on November 14 was at minimum his fifth consecutive absence without making any contact with the employer to report his absences. Claimant's final absence was neither properly reported nor excused. This final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld. As claimant has not claimed and received any benefits since separating from this employer, the issues of overpayment, repayment, and chargeability are moot.

**DECISION:**

The December 14, 2016, (reference 05) unemployment insurance decision is reversed. Claimant 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. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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