

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CAROLYN R COOK**  
Claimant

**ROSE ACRE FARMS**  
Employer

**APPEAL 18A-UI-05046-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/08/18  
Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Overpayment of Benefits  
Iowa Admin. Code r. 871-24(10)- Employer participation in Fact-Finding Interview

**STATEMENT OF THE CASE:**

The employer/appellant filed an appeal from the April 24, 2018 (reference 01) unemployment insurance decision that allowed benefits to the claimant. The parties were properly notified of the hearing. A telephone hearing was held on May 21, 2018. The claimant, Carolyn R. Cook, participated personally. The employer, Rose Acre Farms, participated through witness Tami Ryerson. Employer's Exhibits 1 through 5 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records, including the fact-finding documents.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?  
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:

Claimant was employed full-time as general laborer and manager in training. She was employed from June 30, 2016 until February 21, 2018, when she was discharged. Her job duties included running equipment to package eggs. Claimant's immediate supervisor was Elias Amaya.

The employer does have a written policy in place regarding absenteeism. Claimant received a copy of the absenteeism policy on June 30, 2016. See Exhibit 5. However, the absentee policy changed on January 1, 2018 and claimant did not receive a copy of the new policy. The new policy provided that employees who incur four points in a rolling 90-day period are subject to

discharge. Employees incur from ½ a point to 2 points depending on the type of absence. Employees do receive points for absences due to illness if the absence is not covered by the Family and Medical Leave Act ("FMLA"). Employees are also required to report an absence within at least thirty minutes of their scheduled shift start time.

Claimant was absent on December 10, 2017 due to illness. She did properly report this absence pursuant to the employer's reporting policy.

Claimant was absent from work on January 18, 2018 due to lack of sleep from her neighbors making noise all night. Claimant did not believe that she would physically be able to run the equipment safely due to her lack of sleep. Claimant did report the noise to her landlord that night. Claimant did properly report this absence pursuant to the employer's reporting policy.

Claimant was absent from work on January 26, 2018 due to lack of sleep from her neighbors making noise again all night. Claimant did not believe that she would physically be able to run the equipment safely due to her lack of sleep. Claimant did report the noise to her landlord that night. Claimant did properly report this absence pursuant to the employer's reporting policy.

Claimant was absent from work on February 20, 2018 due to weather. There was ice and snow on the roads and claimant did not believe it was safe to drive her car to work. Claimant did properly report this absence pursuant to the employer's reporting policy.

Claimant had received two written warnings regarding her attendance violations on January 19, 2018 and January 27, 2018. See Exhibit 2 and 3. Claimant has received benefits of \$2,170.00 between April 8, 2018 and May 12, 2018. The employer did participate in the fact-finding interview.

#### **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 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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

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. See *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. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case, the claimant properly reported all of her absences. The absence on February 20, 2018 was due to claimant's judgment call that she would be unable to drive to work with her car. This absence is considered unexcused because it is due to transportation issues.

However, the absences on December 10, 2017; January 18, 2018; and January 26, 2018 were all due to illness or claimant being unable to physically function due to lack of sleep. These are circumstances where there was no deliberate act or omission on behalf of the claimant that caused her to miss work. Claimant's illness on one occasion and lack of sleep on two other occasions are not considered deliberate violations or incidents where claimant disregarded the standards of behavior that the employer has the right to expect of an employee. She did not act with carelessness or with negligence in becoming ill or not being able to sleep due to noisy neighbors that she reported to the landlord.

As such, claimant had one unexcused absence for purposes of unemployment insurance benefits when she was discharged. One unexcused absence is not excessive. As such, the employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify her from receiving benefits. Benefits are allowed, provided claimant is

otherwise eligible. The issue of overpayment is moot. The employer's account may be charged for benefits paid.

**DECISION:**

The April 24, 2018 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The employer's account may be charged for benefits paid.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/rvs