

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JENNIFER M BUFORD
Claimant

CIGARETTE OUTLET INC
Employer

APPEAL 17A-UI-05707-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/07/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 May 30, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 15, 2017. Claimant participated. Employer participated through supervisor Teri Christner. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and claimant's wage history, with no objection.

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 as a clerk from August 15, 2016, and was separated from employment on May 4, 2017, when she was discharged.

The employer has an attendance policy. The attendance policy provides that employees will be warned as unexcused absences occur; it is a progressive discipline. The employer requires employees contact the employer and report their absence at least two hours prior to the start of their shift. Claimant was aware of the employer's policy.

The final incident occurred when claimant was absent from her scheduled shift on May 4, 2017. In the evening on May 3, 2017, claimant called Greg, the store manager, and told him she was not going to be at work on May 4, 2017 because her six month old daughter was sick.

Claimant's six month old daughter had a "busted" ear drum and a fever. Claimant's daycare does not allow children to attend if they have a fever; children have to be without a fever for twenty-four hours. Greg told claimant that you know what that means and she responded yes. Claimant understood that it meant she was going to be discharged. Ms. Christner testified claimant was discharged on May 4, 2017 due to excessive absenteeism.

Claimant was last warned on April 24, 2017, that she faced termination from employment upon another incident of unexcused absenteeism. Employer Exhibit 1. Claimant was also issued a written warning dated April 17, 2017 for her attendance infractions (claimant testified she received this warning when she received her final written warning). Employer Exhibit 1. The employer had verbally discussed with claimant her absenteeism issues prior to the warnings.

Claimant had multiple absences after she was scheduled to return from her maternity leave. Claimant was absent on January 9, 2017, January 10, 2017, January 11, 2017, and January 13, 2017 due to a back injury. Employer Exhibit 1. Claimant went to the doctor for the injury and told Greg she could provide a doctor's note, but he did not want one. On January 27, 2017, claimant was absent from her shift due to illness. Employer Exhibit 1. On January 30, 2017, January 31, 2017, and February 1, 2017, claimant was absent due to illness. Employer Exhibit 1. On March 23, 2017, claimant was absent because she was "stuck" in Tennessee. Employer Exhibit 1. On April 3, 2017 and April 4, 2017, claimant was absent from work because her son had an infection and could not go to daycare. Employer Exhibit 1. On April 17, 2017, claimant was absent from work because of a sick child. Employer Exhibit 1. On April 24, 2017, claimant was absent from work because of a sick child. Employer Exhibit 1. Claimant testified a majority of her absences were due to her illness or injury, or her children's illnesses.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 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. *Gaborit, supra*. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Where an employer is aware of the nature of the claimant's illness and has fair warning that he may be absent for an extended period of time due to that illness, failure of the employee to contact the employer is not misconduct as the absences are excused. This is so where the claimant had no telephone and was bedridden with scarlet fever. *Floyd v. Iowa Dep't of Job Serv.*, 338 N.W.2d 536 (Iowa Ct. App. 1983).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. On May 3, 2017, claimant properly reported to the employer that she would be absent on May 4, 2017, because her six month old daughter was sick and could not go to daycare. Although generally childcare is a personal responsibility, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). Claimant credibly testified that the daycare would not take her daughter because of her daughter's illness, so she had to stay home with her daughter on May 4, 2017. On May 4, 2017, claimant was not absent from work because she did not make arrangements for childcare, she was absent because her normal arrangement (daycare) would not accept her daughter while her daughter was ill. Furthermore, claimant testified most of her absences were related to her illness or injury, or her children's illnesses.

Because claimant's last absence was related to properly reported illness or other reasonable grounds (her daughter's illness), 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.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The May 30, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs