IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JUSTIN R BANDY Claimant **RIE COATINGS INC** Employer	**APPEAL 19A-UI-01237-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/13/19** **Claimant: Respondent (1)**

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 February 4, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 27, 2019. Claimant participated and testified. Employer participated through Human Resource Manager Lynell Lucas and Production Manager Brady Schmitt. Employer's Exhibits 1 through 5 were received into evidence. Official notice was taken of the fact-finding documents in the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-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 April 16, 2018. Claimant last worked as a full-time shipping/receiving clerk. Claimant was separated from employment on January 17, 2019, when he was discharged.

On January 10, 2019 claimant called Lucas requesting to work extra hours on January 11 to prepare a shipment. Lucas told claimant she was fine with it but he needed to get approval from his immediate supervisor, Willie Welton, or the shift lead, Josh. Lucas testified, the following day, she spoke to claimant's direct team lead, Zach, who informed her he had told claimant he did not need to work extra hours that week. Lucas then spoke with Josh, who told her claimant did not contact him about working at all, until he showed up to work. Lucas spoke to Welton who said claimant called him about working extra hours, stating that she (Lucas) had said it was

okay. Welton indicated claimant did not request permission from him to work and he assumed, based on what claimant told him, Lucas was okay with it. Lucas acknowledged she had advised Welton in the past not to assume she had given directives without speaking to her first, as he was sometimes apprehensive around claimant based on an unrelated situation.

Claimant testified he initially approached Zach about working extra hours, as he was out earlier in the day to attend a funeral. Zach told claimant he did not have to come in, but that if he wanted to come in to talk to Welton. (Exhibit 4). According to claimant Welton told him he was fine with it, but to check with Lucas. When claimant spoke to Lucas she told him she was fine with him coming in as long as he had permission from a supervisor. Claimant then called Welton and told him Lucas was okay with him working additional hours. Prior to clocking in claimant also spoke with Josh, who did not say anything about not needing extra help that evening. Claimant testified he believed he had permission to work extra hours.

On December 20, 2018 claimant had been issued a warning regarding his attendance. The warning advised claimant any time off needed to be preplanned, that he must arrive to work on time, and should adhere to his work schedule. (Exhibit 3). This warning was issued after claimant left work early or arrived late on several occasions. Lucas testified claimant violated this warning by working the extra hours, as it did not adhere to his regular schedule. She also acknowledged, however, that it may not have been made clear to claimant that he could not work extra hours unless specifically asked to do so by the employer.

Based on her conversations with Welton, Zach, and Josh, Lucas felt claimant had manipulated the situation to get additional hours and the decision was made to discharge him from employment. The decision to discharge claimant had been made by Monday, January 14. However, prior to the end of his shift that day claimant requested to take leave the following day, January 15, as he had a child who was at home sick who would not be able to attend childcare the next day. The request was approved, as Lucas already knew she was going to discharge claimant. Lucas testified she waited to discharge claimant both because she did not have the appropriate paperwork ready and because she did not want him to think he was being discharged because he needed to care for a sick child. On January 16 claimant called in again because he was sick. Claimant returned to work, with a doctor's note, on January 17 and was discharged at the end of his shift. (Exhibit 1).

The claimant filed a new claim for unemployment insurance benefits with an effective date of January 13, 2019. The claimant filed for and received a total of $2,969.00 in unemployment insurance benefits for the weeks between January 13 and February 23, 2019. The employer did not participate in a fact finding interview regarding the separation on February 1, 2019 because it did not receive a call. The administrative record shows three attempts were made to reach the employer at the telephone number of record, but that number was no longer a valid telephone number. 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:
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> 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.
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> 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.* 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 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. A failure to report to work without notification to the employer is generally considered an unexcused absence.

The claimant in this case was discharged after working hours, outside of those he was normally scheduled, on January 11, 2019. Prior to working on January 11 claimant spoke to two different supervisors and Lucas about his request. Claimant was told by one supervisor, Zach, that he did not need to come in but to talk to Welton. Claimant following this directive and was told by Welton to speak to Lucas. Lucas indicated claimant could work as long as he had permission from Welton or Josh. She made no mention of the language in the December 20 warning regarding adhering to his schedule. Claimant spoke with Welton again, telling him Lucas approved him to work. Welton made no attempt to confer with Lucas on this, nor did he give claimant any indication that he was not approved to work. When claimant arrived to work on January 11 he spoke to Josh, who also gave no indication that he did not need him or that he was not approved to work. While there does appear to have been a lack of communication between Zach, Josh, Welton, and Lucas, there is insufficient evidence to show claimant was deliberately trying to mislead any of the individuals involved. Furthermore, it was not unreasonable for claimant to believe he was approved to work on January 11. As the employer has not established claimant's actions on January 10 and 11 were disqualifying misconduct, benefits are allowed.

To the extent that the employer contends claimant's absences on January 15 and 16 also played a role in his termination, benefits would also be allowed, as this argument is not convincing. Lucas testified that one of the reasons she waited until January 17 to discharge claimant was because she did not want him to think he was being discharged because he needed to care for a sick child. Thus, the January 15 absence was not the basis for claimant's termination. The final absence, on January 16, was due to illness. Such absences are excused, so no final act of misconduct could be established.

As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The February 4, 2019, (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