

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MARIA A CARLOS**  
Claimant

**APPEAL 19A-UI-02201-SC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**S & J TUBE INC**  
Employer

**OC: 02/17/19  
Claimant: Respondent (2)**

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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) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

S & J Tube, Inc. (employer) filed an appeal from the March 8, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Maria A. Carlos (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on March 28, 2019. The claimant participated personally. The employer participated through Safety and HR Manager Missy Willers and First Shift Group Lead Paula Sorrowfree. Spanish interpretation was provided by Ray (employee number 11777) from CTS Language Link. The Employer's Exhibit 1 was admitted into the record without objection. The administrative law judge took official notice of the administrative record, specifically the fact-finding documents.

**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: The claimant was employed full-time as a Production Member beginning on May 15, 2018, and was separated from employment on February 21, 2019, when she was discharged. The employer's attendance policy states that any absence with less than 24 hours' notice is considered unapproved. It also states an employee may be subject to any level of disciplinary action and too many doctor's notes can be considered excessive.

The claimant was absent or tardy to work on multiple occasions. She notified the employer of absences due to illness prior to the start of her shift on June 18, June 26, and June 27 of 2018.

She was late to work without notification to the employer on June 9, July 6, July 12, August 1, and August 29. She missed work on July 10 and July 18 for personal reasons and notified the employer before the start of her shift that she would be absent. The claimant was no-call/no-show for her shift on August 13, but provided a doctor's note excusing her absence the following day. The claimant received a verbal warning on August 30 that notified her that one unapproved absence prior to November 27 would result in a written warning.

The claimant notified the employer prior to the start of her shifts on September 5 through September 10 that she was ill. She provided a doctor's note upon her return to work. The claimant did not notify the employer of her absences prior to the start of her shifts on October 2 and October 15, but brought in doctor's notes excusing her absences the same day or the following day. On November 5, the claimant had a no-call/no-show absence.

The claimant received a written warning from First Shift Group Lead Paula Sorrowfree on November 7. She was told that any unapproved absences on or before February 6, 2019 would result in further discipline not to exclude termination. The claimant was not provided an interpreter when receiving this document but indicated to Sorrowfree that she understood the contents.

The claimant missed work due to illness on December 7 and 8, 2018. She notified the employer prior to the start of her shift that she would not be at work either day. The claimant missed work due to illness on January 7 and February 4 through 8, 2019 and reported her absences to the employer prior to the start of her shifts.

The claimant's final absence occurred on February 20 when she notified the employer that she would not be at work due to weather. There was ice in the claimant's parking lot and she lives on a hill. No other employee missed that day due to weather. Safety and HR Manager Missy Willers left a voice message on the claimant's phone that afternoon to offer the claimant the opportunity to make up the eight hours she had missed. The claimant did not report to work that day. Willers and Sorrowfree reviewed the claimant's absences and determined that she had excessive doctor's notes and absenteeism. The claimant was terminated the following day.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$822.00, since filing a claim with an effective date of February 17, 2019, for the three weeks ending March 23, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview because the employer's participant was not available when called by the fact-finder.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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 provides, in relevant part:

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.

...

(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.

This definition of misconduct 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). 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 the 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); 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 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*.

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.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events with regard to the claimant's absences. The employer provided written documents maintained over the course of the claimant's employment about her absences; whereas, the claimant did not track her absences and provided generalities when testifying about her absences.

The claimant had eleven absences from the start of her employment through the verbal warning issued on August 30, 2018. Three of her absences were excused as they were related to illness and properly reported and the rest of the absences were unexcused. She had five days on which she was tardy without notice to the employer or an explanation as to why she was tardy. She missed two days due to issues of personal responsibility. She had one additional absence related to illness; however, it was not properly reported as she did not notify the employer prior to the start of her shift.

The claimant had eight absences between the verbal warning and the written warning issued November 7, 2018. Five of those absences were excused as they were related to illness and properly reported. The three unexcused absences were no-call/no-show absences. While two were later determined to be due to illness, they were not properly reported as she did not notify the employer prior to the start of the shifts.

The claimant had nine absences following the written warning. Eight of the absences were excused as they were related to illness and properly reported. The final absence was unexcused as it was related to an issue of personal responsibility, specifically transportation to work. While the employer's November 7 written warning could be confusing as it gave a 90-day probationary period that expired February 6, 2019, a reasonable employee would understand

that further absences could result in discipline including discharge based on the history of warnings.

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 unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are denied.

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

Payment – determination – duration – child support intercept.

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871-subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.3(7). However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits she received and the employer's account shall be charged.

**DECISION:**

The March 8, 2019, reference 01, unemployment insurance decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$822.00. However, she is not obligated to repay the agency those benefits as the employer did not participate in the fact-finding interview and its account shall be charged.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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