

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CAMILLA L TILLMAN
Claimant

APPEAL 16A-UI-05459-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED BARTON SECURITY SVCS LLC
Employer

**OC: 04/17/16
Claimant: Respondent (1)**

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 May 3, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on May 31, 2016. The claimant participated personally. The employer participated through Ron Tardiff, site manager. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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: The claimant was employed full time as a security officer and was separated from employment on April 15, 2016, when she was discharged for excessive absenteeism.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving 5 points in a rolling 90-day period. The employer's policy states that employees are expected to call off four hours prior to shift and at a minimum of two hours prior to a shift to

report an absence (Employer's Exhibit Two). The claimant was made aware of the employer's policy at the time of hire and was last warned on March 30, 2016 for her attendance (Employer's Exhibit Two).

The employer reported the claimant had the following absences that contributed to her discharge:

January 14, 2016: tardy.
February 9, 2016: tardy.
March 8, 2016: left shift early.
March 9, 2016: Called off due to childcare.
March 10, 2016: Called off due to illness.
March 25, 2016: Called off due to illness.
March 26, 2016: Called off due to illness.
April 2, 2016: Called off due to illness and furnished a doctor's note.
April 4, 2016: Called off due to illness and furnished a doctor's note.
April 9, 2016: Called off due to illness and furnished a doctor's note.
April 11, 2016: Called off due to illness and did not furnish a doctor's note.
April 12, 2016: Called off due to illness and did not furnish a doctor's note.

The claimant denied being tardy on January 14 or February 9, 2016. The claimant left early on March 8, 2016 and called off the next day related to childcare issues. The remaining absences were attributable to her illness and were compliant with the all off procedures. The final absences on April 11 and 12 triggered the claimant's discharge. The claimant did not furnish a doctor's note for the absence but offered to obtain one. The employer reported a doctor's note would not have changed the outcome to discharge her. There was disputed evidence presented that the claimant properly reported the absence because she called at 10:59 a.m. (Employer's Exhibit Two) for her 2:00 p.m. shift and, therefore, only called off three and not four hours in advance. The claimant indicated because she was within the mandatory two-hour notice, she was compliant with the call-off procedures.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,058.00, since filing a claim with an effective date of April 17, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview personally or by way of its third party vendor, or make a witness with direct knowledge available for rebuttal.

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:

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 of proof in establishing disqualifying job misconduct. 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.

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant met the notification requirements on April 12, 2016, by calling off three hours prior to her shift.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. The employer has not established that the claimant had excessive absences that would be considered unexcused for purposes of unemployment insurance eligibility. In this case, the final absences on April 11 and 12, 2016 were due to illness; which she properly reported, and therefore would be considered excused. Because the last absence was related to properly reported illness or other reasonable grounds, 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.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Because the claimant is eligible for benefits, she has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The May 3, 2016 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not subject to relief from charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

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