IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PHILIP CARTEE Claimant **PINNACLE HEALTH FACILITIES XVII** Employer	**APPEAL 17A-UI-06712-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/04/17** **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 June 21, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on July 19, 2017. The claimant participated and testified. The employer participated through Human Resource Director Jennifer Menke. Employer's Exhibits 1 through 8 and claimant's Exhibits A and B were received into evidence.

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: Claimant was employed full time as a CNA from February 25, 2017, until this employment ended on June 2, 2017, when he was discharged.

Claimant has ongoing issues with his knees that sometimes make it difficult to work. On May 18, 2017, claimant's treating doctor restricted him to light duty with no bending or prolonged standing for one week. (Exhibit A). On May 23, 2017, his knees were bothering him, so he reported this to the charge nurse on duty. The charge nurse told claimant that because his issues were not work related, he was a liability and could not work until his restrictions were lifted. The charge nurse is the supervisor when no one else is on duty, which was the case at this time on this day. Based on this directive claimant did not go in to work on May 24 or 25. The employer's policy provides that employees are to call in at least two hours prior to a scheduled shift if they are going to be absent. (Exhibit 2). Claimant received and understood

this policy. (Exhibit 1). Claimant testified he did not think he needed to call in those dates, as he had been specifically advised by a supervisor not to come in.

On May 25, claimant had a follow-up appointment with his doctor. Claimant's doctor continued his restrictions until May 31, 2017. (Exhibit B). On May 26, 2017, two hours prior to his scheduled shift, claimant called the employer and informed the charge nurse on duty that he would not be in and his restrictions had been continued until May 31. Based on the prior directive he had been given, claimant did not believe he needed to do anything further. Menke testified she was unaware of either conversation claimant had with the charge nurses, though she did confirm the charge nurse claimant said he spoke to on May 26 was indeed working that day. Because these conversations were not communicated to Menke, it was believed claimant had been a no-call/no-show since May 23. According to Menke both she and Administrator Randy Sparks tried calling claimant on May 24 and 25, but the phone would just ring. Claimant testified the number Menke and Sparks were using was an old telephone number and that he had provided his previous immediate supervisor and the scheduler his new number at the time of the change.

On May 26, 2017, after they were unable to reach claimant, Menke and Sparks sent him a certified letter asking him to contact them immediately to discuss what was going on. On May 31, 2017, claimant received the letter from the employer indicating they had been trying to reach him unsuccessfully via telephone and requesting he contact them right away. Claimant immediately contacted Sparks as directed in the letter. Sparks asked claimant what was going on and informed him it appeared as though he was self-terminating, as he had not called or come in to work since May 23. Claimant testified he tried to explain the situation to Sparks, but he would not let him get a word in. Sparks then notified claimant he would speak to corporate and would get back to him. On June 2, 2017, Sparks informed claimant he was being separated from employment due to his no-call/no-shows. Menke testified she never heard from claimant, but had no idea if he spoke to Sparks. According to Menke she was given the directive from Sparks to separate claimant from employment on June 8, 2017.

The claimant filed a new claim for unemployment insurance benefits with an effective date of June 4, 2017. The claimant filed for and received a total of $2,385.00 in unemployment insurance benefits for the weeks between June 4 and July 15, 2017. The employer did not participate via telephone in the fact finding interview regarding the separation on June 20, 2017, but participated via written documentation by providing Exhibits 1 through 8 to the fact finder. This documentation included the employer's relevant policies and documentation of claimant's absences in May. 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:

> 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.* 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. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Here, the claimant was discharged because the employer believed he had failed to call in or report for work since May 23, 2017. Claimant provided unrebutted testimony, however, that he did not come in to work because he had been directed by a supervisor not to do so until his restrictions were lifted. Claimant's initial restrictions were set to expire after May 25 but, during a doctor's appointment on that date, his doctor extended those restrictions until May 31. Claimant called and notified the supervisor on duty of this extension two hours before his next scheduled shift in accordance with the employer's policies. Once the claimant received the certified letter on May 31 and realized the employer had not been made aware of his situation by the supervisors on duty, he immediately called Sparks as instructed. Claimant's unrebutted testimony was that he tried to explain the situation to Sparks, but he would not listen and eventually terminated his employment. Claimant has established that, while he was absent beginning May 24, his absences were properly reported and due to a medical condition. As the absences were related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The June 21, 2017, (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