

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAWN R BRINGMAN
Claimant

NCI GROUP INC
Employer

APPEAL 17A-UI-06472-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/28/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Absenteeism
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Admin. Code r. 871-24.25(35) – Separation Due to Illness or Injury
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 14, 2017, (reference 01) unemployment insurance decision that allowed benefits based. The parties were properly notified of the hearing. A telephone hearing was held on July 13, 2017. The claimant participated and testified. The employer participated through Human Resource Analyst Britten Finlen. Employer's Exhibits 1 through 3 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 machine operator from February 6, 2017, until this employment ended on May 22, 2017, when she was discharged.

On March 9, 2017, claimant went on an approved leave of absence for a non-work related medical condition. This was upon the advice of claimant's treating doctor, a neurologist. Claimant remained in contact with the employer during her leave and provided them with regular updates on her condition. On May 22, 2017, claimant was sent a letter informing her that she was being discharged from employment because her leave had been exhausted. (Exhibits 2

and 3). Claimant received this letter on May 23, 2017. This letter was prompted by a work excuse the employer had received from claimant's general practitioner excusing her from work until June 20. (Exhibit 1). Claimant testified this letter was for the same medical condition she was seeing her neurologist for and that her general practitioner deferred to the neurologist in regards to whether she was able to work.

On the same day she received the letter, claimant went to a scheduled appointment with her neurologist. Claimant's neurologist then released her to return to work without restriction the following day and provided her with written documentation of such. Claimant attempted to call the employer to inform them of this on May 23, but was not able to reach anyone. Claimant left voicemails, which were returned several days later by a member of human resources. Claimant explained that she had been released to return to work and was asked if she had submitted a new application for hire. Claimant indicated she had. The human resources official told claimant she would look at her application and speak to a supervisor. Claimant never heard back from the employer. Claimant since has begun working for another employer beginning June 26, 2017.

The claimant filed a new claim for unemployment insurance benefits with an effective date of May 28, 2017. The claimant filed for and received a total of \$1,292.00 in unemployment insurance benefits for the weeks between May 28 and June 24, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on June 13, 2017. 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(1)d provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the

claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

- (a) Obtain the advice of a licensed and practicing physician;
- (b) Obtain certification of release for work from a licensed and practicing physician;
- (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
- (d) Fully recover so that the claimant could perform all of the duties of the job.

Claimant was off work due to a non-work related medical condition and upon the advice of her treating doctor. Claimant had not quit her employment, but was on a medical leave of absence. Prior to being released to return to work, claimant was discharged from employment. A claimant who is terminated prior to a return from a leave of absence is not obligated to return to the employer to offer services after the expiration of the leave of absence. *Porazil v. Jackman Corporation*, Case No. 3-408/02-1583 (Iowa Ct. App. August 27, 2003). In this type of situation, claimant no longer has an employment relationship to return to. In this case, claimant nevertheless attempted to contact the employer to return to work, but no work was offered.

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.

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.

Claimant was on a medical leave of absence per the advice of her treating doctor. Claimant remained in contact with the employer during her leave, providing regular updates on her medical status. On May 22, 2017, claimant was notified that she was being terminated because her leave had been exhausted. Claimant received this notification on May 23, 2017 and was released to return to work without restriction the following day. While it may be true that claimant's absence put the employer in a difficult situation, this is not deliberate misconduct. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The June 14, 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs