

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**CANDICE M WASHINGTON**  
Claimant

**APPEAL 17A-UI-03537-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STORY COUNTY HOSPITAL**  
Employer

**OC: 03/05/17  
Claimant: Respondent (1)**

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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 March 24, 2017, (reference 04) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 25, 2017. The claimant participated personally. The employer participated through Nicholas Rosenberg, director of food and nutrition. Employer Exhibits 1, 2, and 3, were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, 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 dietary aide, beginning February 22, 2017 and was separated from employment on March 1, 2017, when she was discharged (Employer Exhibit 2).

The employer has a policy which requires employees to notify an immediate supervisor one hour prior to a shift start of an intended absence (Employer Exhibit 3). If an employee has three consecutive absences, they will be deemed to have quit by way of job abandonment (Employer Exhibit 3). The employer asserted that during an employee's 90 day probationary period, an employee may be discharged at any time, regardless of policy. The undisputed evidence is prior to separation, the claimant was not issued any written discipline or told her job was in jeopardy.

During the claimant's short employment with this employer, she had three absences. On February 23, 2017, the claimant properly reported an absence due to her two-month child, Tiana, being sick. Then, on February 25, 2017, the claimant learned her five year old daughter, Aleyah, had jumped off a table while staying with her grandfather (the claimant's father), and broke her arm. Even though the injury occurred in the morning, the claimant stayed through lunch to help serve, before leaving at 1:00 p.m. in advance of her 2:30 end time. The evidence is disputed as to whether Mr. Rosenberg verbally warned the claimant about her attendance at that time. Then on February 28, 2017, the claimant called Jessica Lingo, in human resources, to alert her that she may be taking Tiana to the hospital. The claimant stated she text messaged Mr. Rosenberg around 4:45- 5:00 a.m. on March 1, 2017, that she was at the Ames hospital with Tiana, who had RSV, and was being airlifted to Blank Children's Hospital. He did not reply to the message and stated he did not receive any notification of the claimant's absence until afternoon, and after her shift started. Consequently, she was discharged for being a no call/no show on March 1, 2017.

The administrative record reflects that claimant has a weekly benefit amount of \$449.00 but has not received unemployment benefits since filing a claim with an effective date of March 5, 2017. The administrative record also establishes that the employer did not participate in the March 23, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal. Rather, Jessica Lingo, human resources, was called and a voicemail was furnished to her, but she did not respond. Ms. Lingo did not attend the hearing or issue a written statement regarding her participation in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)...accurately states the law").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). In this case, the claimant had three absences in an 8 day period, all which involved illness or injury to her two month and five year old children.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The administrative is sympathetic to the reasonable positions of both parties: the claimant had legitimate medical issues involving her small children, and the employer had business operations to run, and the claimant's unplanned absences certainly could affect meals being served timely.

The claimant's absences on February 23 and 25 were properly reported and for reasons that would be considered excused for unemployment insurance purposes. At issue, is whether the claimant's final absence, attributed to her minor child being airlifted to another hospital during her shift, would warrant an unexcused absence, and constitute misconduct for purposes of disqualifying her from benefits. The evidence is disputed as to whether the claimant properly reported the employer of her absence on March 1, 2017, while at the Ames hospital with her two month child. Even if the claimant did not call or contact the employer prior to her shift start, she would have only one unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. Because her absences were otherwise 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, provided the claimant is otherwise eligible.

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.

Because the claimant is eligible for benefits, the issues of overpayment and employer relief of charges are moot.

**DECISION:**

The March 24, 2017, (reference 04) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer is not relieved of charges.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs