

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ARMANDO J HERNANDEZ**  
Claimant

**SCE PARTNERS LLC**  
Employer

**APPEAL 20A-UI-03049-AD-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/22/20**  
**Claimant: Appellant (1R)**

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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

**STATEMENT OF THE CASE:**

On April 11, 2020, Armando Hernandez (claimant) filed an appeal from the April 9, 2020 (reference 01) unemployment insurance decision that found he was not eligible for benefits.

A telephone hearing was held on May 6, 2020. The parties were properly notified of the hearing. The claimant participated personally. Nichole Kruse participated as a witness on behalf of claimant. SCE Partners, LLC (employer) did not register a number for the hearing and did not participate.

Official notice was taken of the administrative record.

**ISSUE:**

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause? Is claimant's separation disqualifying due to incarceration?
- II. Was the claimant overpaid benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a part-time table games dealer. Claimant's first day of employment was April 17, 2019. The last day claimant worked on the job was January 8, 2020. Claimant's immediate supervisor was Clarinda. Claimant separated from employment on January 13, 2020. Claimant was discharged by Clarinda on that date.

Claimant was discharged due to absenteeism. Claimant was most recently absent on January 11 and 12, 2020. Claimant was absent due to being incarcerated at that time. Kruse contacted Clarinda prior to claimant's shift starting on January 11 and reported he would be absent that day

and the following day. Claimant returned to work for his scheduled shift on January 13 and was discharged at that time.

Claimant was convicted of the charges which led to his incarceration. He was previously absent around Christmas 2019 to spend time with family. Claimant reported he would be absent on that date but did not have paid time off. Claimant had previously been absent around November 2019 due to an impairment. He properly reported those absences but believes he received attendance points nonetheless. Employer has a no-fault attendance policy.

Claimant had 7.5 attendance points prior to his absences on January 11 and 12. Twelve attendance points lead to discharge. Claimant believed he should have only received two points for the absence on January 11, as the absence was reported but not the minimum two hours prior to his shift start time. Claimant believed he should have received one point on January 12 because the absence was properly reported. However, the absence on January 12 was counted as a no-call/no-show absence, resulting in six points and putting claimant well beyond the 12-point mark for discharge.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$512.00 for a total of six weeks, from the benefit week ending March 28, 2020 and continuing through the benefit week ending April 2, 2020. The total amount of benefits paid to date is \$3,072.00. Claimant has also received Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of \$3,000.00.

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

For the reasons set forth below, the April 9, 2020 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits is **AFFIRMED**. Claimant is not eligible for benefits until he earns wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause? Is claimant's separation disqualifying due to incarceration?

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.

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.

Iowa Code section 96.5(11)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

11. *Incarceration –disqualified.*

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection 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.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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).

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).

Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

Employer has carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2).

Claimant was discharged due to excessive absenteeism. Claimant was most recently absent on January 11 and 12, 2020. Claimant was absent due to being incarcerated at that time. While claimant reported the absences, reported to work afterwards, and his services were rejected, he was found guilty of the charges against him. For this reason, those absences are considered unexcused under Iowa law.

Claimant was also absent around Christmas 2019 to spend time with family. While the administrative law judge is sympathetic to claimant's desire to spend time with his family, this absence was not pre-approved time off and was not for "reasonable grounds." As such, it is also considered unexcused under Iowa law.

Even discounting the prior absences related to his impairments, claimant had three unexcused absences within approximately three weeks. The administrative law judge finds this constitutes excessive absenteeism under Iowa law and as such claimant must be disqualified from benefits.

The administrative law judge understands claimant did not wish to be absent on the days he was incarcerated. However, he chose to take the actions which led to his incarceration and subsequent finding of guilt. His absences, while not intentional, were the result of deliberate acts which he knew or should have known would result in his being unable to attend work as scheduled.

The administrative law judge also notes claimant's argument that he should not have been assessed the points he was for the most recent absence on January 12 and, if the points were correctly assessed, he would not have reached the 12-point threshold for discharge. However, employer's policies are not determinative of whether claimant was discharged for job-related misconduct.

Under Iowa law, claimant's unexcused absences do rise to the level of job-related misconduct. Furthermore, while claimant was perhaps assessed points incorrectly, employer did make the decision to discharge him based on his absences. Employer is not ultimately bound by its policies,

either, and may deviate from those policies so long as it does not do so in a way that is discriminatory. There was no allegation or evidence of such a discriminatory intent here.

II. Was the claimant overpaid benefits?

Iowa Code section 96.3(7) provides, in pertinent part:

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 unemployment insurance system shows claimant has received weekly benefits in the amount of \$512.00 for a total of six weeks, from the benefit week ending March 28, 2020 and continuing through the benefit week ending April 2, 2020. The total amount of benefits paid to date is \$3,072.00.

Because the administrative law judge affirms the decision that claimant was not eligible for benefits, he has been overpaid benefits in that amount. Benefits shall be recovered. 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.

**DECISION:**

The April 9, 2020 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits is AFFIRMED. Claimant is not eligible for benefits until he earns wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid benefits in the amount of \$3,072.00. Benefits shall be recovered. 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.

**REMAND:**

The issue of overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits is remanded to the Benefits Bureau of IWD for an investigation and decision.



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Andrew B. Duffelmeyer  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515) 478-3528

May 8, 2020  
Decision Dated and Mailed

abd/scn

*Note to Claimant:* This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.