

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VALORIE M PEITZMAN
Claimant

APPEAL 16A-UI-02954-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA HOME CARE LLC
Employer

**OC: 02/14/16
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 February 26, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 30, 2016. Claimant participated. Jennifer Lepera participated on claimant's behalf. Employer participated through home health aide supervisor, James Warwick. Human resources director, Susie Douglas attended the hearing on behalf of the employer, but did not testify. Denny Kigin registered for the hearing on behalf of the employer, but did not attend.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 client care coordinator from October 5, 2015, and was separated from employment on February 15, 2016, when she was discharged. Ms. Lepera was claimant's supervisor from the time claimant was hired until February 4, 2016 when Ms. Lepera was separated from the employer.

The employer has a written attendance policy. Employees can be discharged for excessive absenteeism. Excessive unexcused absences will lead to discipline, up to and including discharge. A doctor's note does not excuse an absence. Pursuant to the employer's policy, claimant was not eligible for PTO or sick time for the first six months of employment. Claimant was aware of the policy.

The final incidents occurred on February 11 and 12, 2016. On February 11, 2016, claimant requested to be late because of her son's doctor appointment, which was granted by the employer. Upon arrival at the appointment, claimant was instructed to take her son to the emergency room to get her son's arm reset. Claimant called the employer and stated she was going to be absent the rest of the day to be with her son. On February 12, 2016, claimant left early from her scheduled shift; she left around 2:30 p.m. Claimant left early because her son was not feeling well. Claimant's son had a procedure done the day before and started to not feel well as the day progressed. Claimant instant messaged Mr. Warwick that she was leaving early. On the morning of February 12, 2016, claimant gave the doctor's note to Mr. Warwick that excused her for February 11 and 12, 2016. Claimant still tried to work on February 12, 2016, but she told Mr. Warwick that if her son started to feel worse she was going to have to go home. Mr. Warwick told claimant ok and to keep him informed.

On February 9, 2016, claimant was given a verbal warning for absenteeism. The verbal warning was documented in writing and claimant signed for it on February 9, 2016. Claimant was warned that her job was in jeopardy. The warning was for claimant's multiple absences that the employer considered unexcused. Claimant left early on November 6, 2015 because her grandfather was not feeling well. The employer considered this absence to be unexcused, but Ms. Lepera told claimant her absence would be excused. On November 9 (funeral arrangements) and 10 (funeral), 2015, claimant was absent because her grandfather had passed away. The employer considered these absences to be bereavement. Ms. Lepera told claimant her absences would be excused. On November 11, 2015, claimant was gone for meeting with attorney. The employer considered this absence to be bereavement. Ms. Lepera told claimant her absence would be excused. Claimant was absent on November 18, 2015 for her grandmother's funeral, but she worked on November 15, 2015 to make up for her absence with approval from the employer. On December 14, 2015, claimant called in at 6:00 a.m. and reported that she was sick. Claimant followed the reporting policy and made up her time later, but the employer considered the absence unexcused. On December 18, 2015, claimant called in absent at 8:40 a.m. and reported her child was sick. The employer considered the absence unexcused. On January 11, 2016, claimant called in sick at 8:00 a.m. The employer considered the absence unexcused. On January 12, 2016, claimant called in at 7:52 a.m. and reported she was sick. The employer considered the absence unexcused. On January 21, 2016, claimant was absent for her son's orthopedic appointment (the appointment was from 9:00 a.m. to noon). Claimant filled out a request for leave form at the request of Ms. Lepera prior to January 21, 2016 and it was approved by Ms. Lepera. Claimant arrived to work at 10:05 p.m. on January 21, 2016. The employer considered this unexcused. On February 2, 2016, claimant called around 7:52 a.m. and reported she was going to be absent because of weather; the business was open that day. The employer considered the absence unexcused. On February 8, 2016, claimant called in sick at 7:30 a.m. The employer considered the absence unexcused. All of the days were scheduled work days, except for November 15, 2015.

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. Benefits are allowed.

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 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "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 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. 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, 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). See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

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.

An employer's attendance policy 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 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.

Claimant's last two absences related to her son's doctor's appointment and subsequent arm resetting procedure that was unexpected. Although the employer does not require or excuse absences for doctor's notes, claimant did provide a doctor's note to excuse her last two absences (February 11 and 12, 2016). The employer's argument that claimant starting work on February 12, 2016 canceled any doctor's excuse for February 12, 2016 is not persuasive. Claimant tried to work on February 12, 2016, but she did inform the employer that if her son started to not feel well, she would have to leave. Claimant's son started to not feel well on February 12, 2016 and so claimant had to leave. Claimant's son not feeling well after having his arm unexpectedly reset is a reasonable ground for claimant to be absent. Furthermore, claimant notified the employer of the reason and provided a doctor's note for the absences. Even though the employer has a policy that claimant was not eligible for PTO or sick time for the first six months of employment and she was aware of the policy, an employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Because claimant's last 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. 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.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The February 26, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css