

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES RISH
Claimant

PROTEIN HOUSE LLC
Employer

APPEAL 24A-UI-04900-SN
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/21/24
Claimant: Respondent (1)

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 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Protein House LLC, filed an appeal from the May 8, 2024, (reference 01) unemployment insurance decision that granted benefits April 18, 2024, based upon the conclusion he was discharged, but misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on June 4, 2024, at 1:00 p.m. The claimant did not participate. The employer participated through General Manager Pierre Talton. Exhibits A, B, C, D, E, F were received. Official notice was taken of the administrative records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

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 cook from January 18, 2024, until this employment ended on April 18, 2024, when he was terminated. The claimant's immediate supervisor was General Manager Pierre Talton.

The claimant worked a variable schedule.

The employer has an employee manual. The attendance policy asks employees to let their immediate supervisor know within three hours of the start of their shift that they will be late or absent. The attendance policy also requires the employee to provide a doctor's note for absences reported as due to illness. The employee manual also has an anti-harassment policy.

On February 20, 2024, the claimant was scheduled to work at 8:00 a.m. At 8:04 a.m., the claimant reported via text message to Mr. Talton that he was not feeling well and would not be coming in that day. The employer provided a copy of the text message string. (Exhibit E)

On February 21, 2024, the claimant was scheduled to work at 11:00 a.m. At 7:04 a.m., the claimant reported via text to Mr. Talton that he had been throwing up all night and would not make it to work that day. The employer provided a copy of the text message string. (Exhibit E)

On March 4, 2024, the claimant was scheduled to work at 10:00 a.m. At 10:15 a.m., Mr. Talton sent the claimant a text message asking him where he was. The claimant said he thought he was scheduled to work at 11:00 a.m. and explained he was looking at the wrong week. (Exhibit D)

On March 12, 2024, the claimant was scheduled to work from 3:00 p.m. to 8:00 p.m. The claimant left at 7:00 p.m. without informing management. The claimant was supposed to close the store. (Exhibit D)

On March 15, 2024, the claimant was scheduled to work at 12:00 p.m. At 11:08, the claimant reported via text message to Mr. Talton that he would not be coming to work that day. The employer provided a copy of the text message string. (Exhibit C)

On April 1, 2024, the claimant was supposed to work at 2:00 p.m. At 12:38 p.m., the claimant said he had an appointment at 3:00 p.m. and would be able to work as soon as he could out of the appointment that day. Mr. Talton approved of this absence.

On April 8, 2024, the claimant was to work at 12:00 p.m. At 3:24 p.m., the claimant reported via text message to Mr. Talton that he took a nap and overslept through the start of his shift. The employer provided a copy of the text message string. (Exhibit B)

On April 10, 2024, the claimant was scheduled to work at 9:00 a.m. At 8:15 a.m., the claimant reported via text message to Mr. Talton that he was having a full mental breakdown and could not come in to work. The employer provided a copy of the text message string. (Exhibit B)

On April 17, 2024, the claimant was working with some two female coworkers. Two female employees reported to Mr. Talton that the claimant was asking "invasive questions" and was scaring them. Two female workers went to the restroom and the claimant knocked on the bathroom door. Mr. Talton informed them that they could leave. The employer provided a copy of the text message string. (Exhibit F) Mr. Talton returned to the store and told the claimant, "You cannot be doing this." Mr. Talton did not know what specifically the claimant said to the women.

On April 18, 2024, the claimant told Mr. Talton that he was too ill to work that day a little over a half an hour before his shift. In response, Mr. Talton told the claimant via text message that he would be terminated. (Exhibit A)

Mr. Talton did not ever formally discipline the claimant for either violation of the harassment policy or the attendance policy prior to terminating him.

The following section of the findings of fact display the findings necessary to resolve the overpayment issue:

The claimant was paid \$320.00 in unemployment insurance benefits after his separation.

On April 26, 2024, Iowa Workforce Development sent a notice of factfinding to the parties informing them of a fact-finding interview on May 7, 2024. Mr. Talton participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged on April 18, 2024, for a non-disqualifying act. Benefits are granted, provided he is otherwise eligible.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant was ill for days he reported as ill in the text messages provided by the employer. See Exhibits A, B, C, D, E, and F.

Mr. Talton offered his speculation that the claimant was not ill because he had been well the preceding day on April 17, 2024. I take Mr. Talton's point, but illness can and does happen quickly sometimes.

I do not give weight to this skepticism in the findings of fact because the claimant does not sugarcoat his poor reasons in certain instances. The claimant admitted to Mr. Talton that he overslept on April 8, 2024. Worse still, the claimant flatly told Mr. Talton that he would not be coming in on March 15, 2024, with no justification whatsoever.

I also find that the claimant's excuse for April 10, 2024, was due to some underlying illness rather than exaggerating his unease. Mr. Talton acknowledged the claimant may have had an underlying mental illness. Exhibit F also tends to show staff believed that he did.

Overall, I find the claimant's excuses in the text messages to demonstrate an unvarnished explanation for each of his absences.

Iowa Code section 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.

Iowa Code section 96.5(2)b, c and d provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is

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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.**
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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. 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 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).

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

(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.**

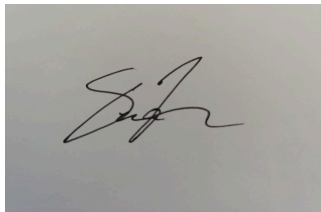
(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. **The termination of employment must be based on a current act.**

In this case, the claimant's termination is non-disqualifying because he reported prior to the start of his shift due to illness per Iowa Admin. Code r. 871-24.32(7). Though the employer's policy stated that the attendance policy required three hours, Mr. Talton's practice, as demonstrated in the findings of fact, shows a practice of accepting far less notice such as authorizing the claimant's being late on April 1, 2024.

Ultimately, I find the employer has not met its burden to show the claimant's absence was due to something that can be attributable to disqualification. Since the final absence is excluded from misconduct, past acts cannot add magnitude to it to make it more disqualifying. See Iowa Admin. Code r. 871-24.32(8) (stating past acts can only be seen as magnifying the blameworthiness of the current act and cannot be a separate basis for disqualification). Benefits are granted, provided the claimant is otherwise eligible for benefits.

DECISION:

The May 8, 2024, (reference 01) unemployment insurance decision is AFFIRMED. The claimant was terminated on April 18, 2024, due to a non-disqualifying reason. Benefits are granted effective April 18, 2024, provided he is otherwise eligible.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge II

June 6, 2024
Decision Dated and Mailed

SMN/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.