

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BRANDYN S DOSS**  
Claimant

**APPEAL 18A-UI-01468-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STAPLES CONTRACT AND COMMERCIAL**  
Employer

**OC: 12/31/17  
Claimant: Respondent (1)**

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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  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the January 22, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 28, 2018. Claimant did not register for the hearing and did not participate. Employer participated through team manager in the customer service department Darwin Oltmans. Official notice was taken of the administrative record, including claimant's benefit payment history and fact-finding documents, with no objection.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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 customer service representative from September 21, 2017, and was separated from employment on November 20, 2017.

The employer has an attendance policy that provides employees will be warned after attendance infractions and six attendance infractions in a rolling calendar year will result in discharge. The employer requires employees contact the employer and report their absence prior to the start of their shift. Employees are hired on a ninety probationary period, which

provides that the first attendance infraction during the probationary period starts the disciplinary process. Claimant was aware of the employer's policy.

Claimant last worked for the employer on November 13, 2017. Claimant was next scheduled to work on November 14, 2017. On November 14, 2017, claimant's wife sent an e-mail to Mr. Oltmans, claimant's direct supervisor, stating that claimant will be gone for a while due to health issues. Claimant's wife did not indicate how long claimant would be absent from work. Claimant's wife sent a second e-mail on November 14, 2017, indicating claimant would be absent for a while. On November 15, 2017, Mr. Oltmans responded to the e-mails. Mr. Oltmans informed claimant that he was going to consult with human resources regarding claimant's employment. Claimant's wife responded thank you. On November 16, 2017, claimant's wife e-mailed Mr. Oltmans that claimant was at home, but has to see his doctor on November 17, 2017 and may have to go to an inpatient care center. On November 17, 2017, Mr. Oltmans attempted to contact claimant, but he did not receive an answer. Mr. Oltmans left a message requesting claimant contact him. Claimant did not return Mr. Oltmans phone call. Later on November 17, 2017, Mr. Oltmans mailed claimant a letter informing him that as of November 20, 2017, he was separated from employment due to his absences. Claimant was scheduled to work on November 14, 15, 16, and 17, 2017, but he was absent on these days. Claimant had no prior disciplinary warnings.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743 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 absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Although claimant was absent from work on November 14, 15, 16, and 17, 2017, he informed the employer, through his wife, about these absences. On November 14, 2017, claimant's wife informed the employer he would be absent for an unknown period of time due to health issues. On November 16, 2017, claimant's wife updated the employer that claimant was at home, but he had to see his doctor on November 17, 2017 and may have to go to an inpatient care center. Therefore the employer was on notice claimant was going to absent on November 14, 15, 16, and 17, 2017 due to illness or other reasonable grounds, which are not considered unexcused for the purposes of unemployment insurance eligibility. The employer then sent claimant a letter on November 17, 2017, informing him he was discharged effective November 20, 2017 due to absenteeism.

Because claimant's final absences (November 14, 15, 16, and 17, 2017) 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 January 22, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs