

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**KARMA MONK**  
Claimant

**APPEAL 21A-UI-06305-SN-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**REM IOWA COMMUNITY SERVICES INC**  
Employer

**OC: 11/22/20**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The employer filed an appeal from the February 9, 2021 (reference 01) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but insufficient evidence had been given to show it was for willful misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 7, 2021. The claimant did not participate. The employer participated through Hearing Representative Judy Berry and Program Director Alyssa Wenner. Exhibits 1-8 were admitted into the record. Two documents were excluded as irrelevant. The administrative law judge took official notice of the agency records.

**ISSUES:**

1. Whether the claimant's separation from employment was disqualifying?
2. Whether the claimant is overpaid regular unemployment insurance benefits?
3. Whether she is overpaid Federal Pandemic Unemployment Compensation benefits?

**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 direct support professional from January 7, 2020, until this employment ended on November 17, 2020, when she was terminated. The claimant's immediate supervisor was Program Supervisor Shelby Graves.

The claimant's schedule alternated between two weekly schedules. One week she was scheduled from 3:00 p.m. to 11:00 p.m. Tuesday through Saturday. The following week she was scheduled 3:00 p.m. to 11:00 p.m. Sunday, Tuesday, Wednesday, Thursday, and Friday. The employer provided a copy of the claimant's schedule. (Exhibit 7)

The employer has an attendance and punctuality policy. The policy states employees are to notify their supervisor of their expected absence at least four hours prior to the start of their shift. The attendance policy does not operate on progressive discipline. The policy instead leaves it

up to the discretion of the supervisor to issue discipline. The employer provided a copy of that policy. (Exhibit 5) The employer also provided a copy of its Employee Information Guide. (Exhibit 8) The claimant received a copy of both around the time of her hire. The employer provided a copy of her acknowledgment. (Exhibit 6)

The employer provided a copy of the claimant's attendance record from April 19, 2020 to August 13, 2020. (Exhibit 2) This attendance record reflects dates in which the claimant would be excused due to health reasons. These are not described below because they would be excused under unemployment law.

On April 14, 2020, the claimant was forty minutes late to her scheduled shift at 11:00 a.m. She did not attempt to explain why she was late that day. (Exhibit 2)

On May 5, 2020, the claimant did not report to work for a whole shift. Fifty minutes after the start of her shift, the claimant informed her supervisor that she had missed her alarm. (Exhibit 2)

On May 15, 2020, the claimant told her supervisor that she would be an hour late for her shift beginning at 7:00 a.m. due to inadequate childcare. (Exhibit 2)

On May 30, 2020, the claimant was fifteen minutes late for her shift. The claimant did not inform her supervisor that she arrived late for work. (Exhibit 2)

On June 2, 2020, the claimant was an hour and eight minutes late for her shift scheduled to begin at 7:00 a.m. The claimant sent the following text message reading, "On way," to her supervisor at 7:46 a.m. (Exhibit 2)

On June 28, 2020, the claimant was thirty-eight minutes late for her scheduled shift at 3:00 p.m. (Exhibit 2)

On July 1, 2020, the claimant was twenty-eight minutes late for her scheduled shift at 3:00 p.m. (Exhibit 2)

On July 7, 2020, the claimant was thirteen minutes late for her scheduled shift at 3:00 p.m. The claimant did not tell her supervisor that she arrived late that day. (Exhibit 2)

On July 16, 2020, the claimant was eight minutes late for her scheduled shift at 3:00 p.m. The claimant said that she lost her keys and was late. (Exhibit 2)

On July 23, 2020, the claimant was eight minutes late for her scheduled shift at 3:00 p.m. (Exhibit 2)

On July 29, 2020, the claimant was six hours and seven minutes late for her scheduled shift at 3:00 p.m. (Exhibit 2)

On July 31, 2020, the claimant did not tell Ms. Wenner prior to the start of her shift that she would be absent. Ms. Wenner received a text message from someone who identified themselves as the claimant's boyfriend that she would not be working that day because she was in the hospital. (Exhibit 2)

On August 4, 2020, the claimant received a written warning for absenteeism. The claimant received this discipline due to the incidents occurring on July 22, 2020 and July 31, 2020. In

conclusion, the warning stated, "If the above corrective actions are not met, further disciplinary action will take place up to and including termination." (Exhibit 4)

On August 5, 2020, the claimant was fifty-three minutes late for her shift scheduled at 11:00 a.m. (Exhibit 2)

On August 8, 2020, the claimant was thirteen minutes late for her shift scheduled at 3:00 p.m. (Exhibit 2)

On August 13, 2020, the claimant was eight minutes late for her scheduled shift 3:00 p.m. and left nine minutes before the scheduled end of her shift at 11:00 p.m. (Exhibit 2)

On September 1, 2020, the claimant received a final corrective action plan regarding her absenteeism. This final corrective action was issued to her because she did not tell Ms. Wenner prior to the start of her shift that she would be absent. The employer did not provide a copy of the final corrective action form, but it is referenced on the claimant's termination notice. (Exhibit 3)

On November 10, 2020, the claimant was scheduled to work. In the hearing, Ms. Wenner testified she made multiple attempts to contact the claimant and was not successful. The termination notice states, "The claimant reported at 3:10 p.m. that she did not feel well and that she was heading into town."

On November 11, 2020, the claimant did not arrive at work at her scheduled time. The claimant did not inform Ms. Wenner she would be absent that day prior to the start of her shift. The claimant told a coworker she would not be coming into work because she did not want to work at an alternate work location. Ms. Wenner did not remember the name of the coworker who is referenced on the termination notice. The claimant made no further contacts with the employer after that date.

On November 18, 2020, the claimant received a termination notice regarding her absenteeism signed by Program Director Alyssa Wenner. (Exhibit 3)

The following section outlines the findings necessary for the overpayment issue:

The claimant made an effective claim on November 22, 2020. The claimant's weekly benefit amount is \$269.00. The claimant received eight full weekly benefit amount regular unemployment payments and a payment of \$106.00 for a total of \$2,258.00 from November 28, 2020 to January 30, 2021. The claimant received five Federal Pandemic Unemployment Compensation payments of \$300.00 gross from January 2, 2021 to January 30, 2021 for a total of \$1,500.00.

The employer's witness was not aware if anyone participated in fact finding or if it received notice of fact-finding. The administrative record KFFV and KFFD do not show a fact-finding was conducted; rather it appears Iowa Workforce Development relied on cold calls at fact-finding.

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

For the reasons that follow, the administrative law judge concludes the claimant was 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).

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.

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).

An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further improperly reported unexcused absences could result in termination of employment and the final absence was not properly reported excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award

benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in [871—subrule 24.32\(7\)](#). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous

pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The claimant received eight full weekly benefit amount regular unemployment payments and a payment of \$106 for a total of \$2258 from November 28, 2020 to January 30, 2021.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer had no notice of a fact-finding interview. By not giving notice to the employer, the employer did not have an opportunity to provide a valid telephone number to the fact-finder. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency's request for information relating to the payment of benefits. Instead, benefits were paid because employer did not receive a call at a correct number from the agency. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had

been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

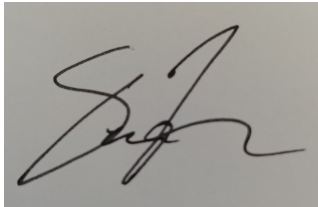
Here, the claimant is disqualified from receiving regular unemployment insurance (UI) benefits. Accordingly, this also disqualifies claimant from receiving Federal Pandemic Unemployment Compensation (FPUC). The claimant was overpaid \$1500.00 in Federal Pandemic Unemployment Compensation (FPUC). The claimant is not excused from repaying these payments due to the employer's non-participation at fact-finding.



**DECISION:**

The February 9, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$2,258.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview due to no fault of its own and its account shall not be charged. Rather, the overpayment should be charged to the fund. However, the claimant also received \$1,500.00 in FPUC. This money shall be repaid.



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May 27, 2021  
Decision Dated and Mailed

smn/kmj