

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MACKENZIE J CARTER
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 19A-UI-05187-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/02/19
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 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On June 28, 2019, the employer filed an appeal from the June 18, 2019, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish the discharge was for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held on July 24, 2019. The claimant, Mackenzie J. Carter, participated. The employer, Casey's Marketing Company, participated through Heather Von Elling, Store Manager. Employer's Exhibits 1 and 2 were received and admitted into the record over objection. The administrative law judge took official notice of the administrative record.

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 began working for the employer on October 16, 2018. Most recently, claimant was employed full-time as a cashier and donut-maker. Claimant's employment ended on May 28, 2019, when she was discharged for absenteeism.

Claimant failed to report to work on May 28, 2019, due to a domestic violence situation. The evening of May 27, claimant contacted Von Elling to report that she was having issues at home and would not be at work the following morning as scheduled. Claimant spoke to Von Elling for six minutes. Claimant notified Von Elling that the police had instructed her not to report to work.

Von Elling offered to pick claimant up for work and stay with her while she worked. Claimant may have intended to take up this offer. However, her partner took her phone away from her, so claimant had no way of contacting Von Elling. Claimant used an old phone and attempted to reach Von Elling through another employee. The following day, claimant was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,160.00, since filing a claim with an effective date of June 2, 2019, for the five weeks ending July 20, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal. When called, the employer stated it did not wish to participate in the fact-finding interview.

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, provided she is otherwise eligible.

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).

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*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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.

In this case, the employer has not established that claimant was discharged for disqualifying misconduct. Claimant's final absence was due to domestic violence in her home. This is certainly reasonable grounds to miss a day of work. Claimant credibly testified that the police advised her not to report to work. Claimant also credibly testified that she contacted Von Elling and reported that she would not be at work that day. The record reflects that there is no final or current incident of unexcused absenteeism which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As claimant's separation is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The June 18, 2019, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn