

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JERICHA H GARZA**  
Claimant

**APPEAL 21A-UI-18810-DH-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABCM CORPORATION**  
Employer

**OC: 06/13/21  
Claimant: Respondent (1)**

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Iowa Code § 96.5(1) - Voluntary Quit  
Iowa Code § 96.5(2)a - Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(8) - Current Act  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview  
PL 116-136, Sec. 2104 - Federal Pandemic Unemployment Compensation

**STATEMENT OF THE CASE:**

Employer, ABCM Corporation, filed an appeal from the August 13, 2021, (reference 01) unemployment insurance decision that granted benefits based upon finding the June 12, 2021 dismissal was not for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on October 15, 2021. The claimant, Jericha Garza, failed to respond to the hearing notice and provide a telephone number at which they could be reached for the scheduled hearing. The employer/appellant participated through Stephanie Gilbertson, human resources coordinator, Crystal Thropt, administrator, and Katlyn Vanderpool business office assistant. Judicial notice was taken of the administrative file.

**ISSUES:**

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?  
Was claimant overpaid benefits?  
Should claimant repay benefits and/or charge employer due to employer participation in fact finding?  
Was claimant eligible for/overpaid FPUC benefits?

**FINDINGS OF FACT:**

Having heard the testimony and reviewed all of the evidence in the record, the administrative law judge finds claimant was a full time employee, with their first day of work being October 29, 2020 and their last day worked being June 12, 2021. Their title was environmental aide at the Lake Mills Care Center. On June 14, 2021, Ms. Thropt, and someone from human resources were present to discharge claimant for chronic absenteeism.

Claimant had previously worked for employer, having problems with absenteeism. Employer and claimant signed a Memorandum of Understanding on October 29, 2020 regarding attendance

moving forward with this new employment. The MOU was an attachment to the appeal. Employer has workplace policies on attendance and that policy was an attachment to the appeal. Claimant received a copy of the policy on October 29, 2020.

Employer also has a policy that if an employee finds “their own replacement or who have secured an approved shift change with another employee” then the employee “will not be charged with an occasion of absence.” The employer treats this policy to mean the opposite of what it says, which is if there is an absence where the employee does not find their own replacement (or otherwise secure an approved shift change, hereafter all called find their own replacement) then it will be treated as an unexcused absence. This policy is set forth in a section regarding how absences will not be counted as unexcused. Employer provided attached to the appeal written documentation of absences. The form has a place to mark whether employer finds the absence excused with a boxes to check yes or no. None of the forms list whether the absence is excused or is unexcused, however, the employer found all absences as unexcused due to claimant failed to find replacement (FTFR). The following facts are found regarding the following reported absences.

Date	Called In	Properly Reported	Excused	Law Excuses
06/14/21	Sick	Yes	No (FTFR)	Yes - illness
06/13/21	Sick	Yes	No (FTFR)	Yes - illness
06/03/21	Car Problems	No (15 minutes late)	No (FTFR)	No - Not Properly Reported
05/30/21	Sick	Yes	No (FTFR)	Yes - illness
05/11/21	Sick	Yes	No (FTFR)	Yes - illness
05/06/21	Sick	Yes	No (FTFR)	Yes - illness
05/05/21	Sick	Yes	No (FTFR)	Yes - illness
05/02/21	Family Emergency	Yes	No (FTFR)	Yes - reasonable grounds
04/27/21	Sick	Yes	No (FTFR)	Yes - illness
04/26/21	Sick	Yes	No (FTFR)	Yes - illness
04/09/21	Sick	Yes	No (FTFR)	Yes - illness
04/07/21	Sick	Yes	No (FTFR)	Yes - illness
03/20/21	Sick	Yes	No (FTFR)	Yes - illness

The administrative record reflects that claimant received \$411.00 in regular unemployment benefits for the weeks ending 06/19/2021, 06/26/2021 and 07/03/2021 and \$0.00 in Federal Pandemic Unemployment Compensation (FPUC), since filing a claim with an effective date of June 13, 2021. The administrative record also established that the employer did not participate in the fact finding interview, no firsthand witness was made available for rebuttal, when the employer was called, the representative left a voice mail message, nor was there provided a timely written documentation that, without rebuttal, would have resulted in disqualification. The representative’s notes reflect the employer has no record of claimant.

**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 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.

871 IAC 24.32(1)a(7) 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.

(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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); 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 twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). 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. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. 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.

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 unexcused absences could result in termination of employment and the final absence was not excused. However, there is no final absence, and in combination with the claimant's history of unexcused absenteeism, is not considered excessive. While the employer's policy may allow them to be called unexcused, most all of the absences are excused for purposes of unemployment insurance benefits, as set forth above, since the absences were due to illness or emergency and were properly reported.

Here, there is only one absence, June 3, 2021, that is unexcused since it was not timely reported.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Iowa Admin. Code r.871-24.32(8) provides:

- (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.


With the termination being based upon the June 13 and 14, 2021 absences and these absences being legally excusable, there is not a current act. While employer may have had good reasons

to discharge claimant, they did not have a disqualifying reason and therefore no disqualification is imposed.

The remaining issues of: was claimant overpaid regular benefits; and was claimant overpaid FPUC benefits/eligible for FPUC benefits; and if yes to either or both, does claimant have to repay the regular/FPUC benefits; and is the employer's account to be charged. Because claimant's separation was not disqualifying, these remaining issues are moot. There is no overpayment, no repayment needed and employer's account shall remain charged.

**DECISION:**

The August 13, 2021, (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. All other issues in this appeal are moot.



Darrin T. Hamilton  
Administrative Law Judge

December 9, 2021  
Decision Dated and Mailed

dh/mh