

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

SUZANNE KLENK
Claimant

SAC & FOX TRIBE
Employer

APPEAL 23A-UI-08916-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/13/23
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact Finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the September 6, 2023 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon a separation from work. The parties were properly notified of the hearing. A telephone hearing was held on October 4, 2023. The claimant participated personally. The employer participated through witnesses Craig Youngbear and Teri Papesh. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant's separation from employment disqualifying?
Was the claimant overpaid benefits?
Is the employer's account chargeable due to participation in the fact-finding interview?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for this employer on July 16, 2008. She worked full-time as an emergency medical technician (EMT).

The employer has a written policy regarding attendance that provides for the discharge of an employee if that employee accumulates 9 or more points. Points are given for absences from work, even if the employee is absent due to illness and properly reports that absence to the employer.

The employer also has a written policy regarding notification of absences that provides employees must provide the employer at least a two-hour notice if the employee will be absent from their scheduled work shift. The claimant was aware of both policies.

Claimant's final absence leading to discharge occurred on August 16, 2023, when she was unable to work due to illness/injury to her back. This was not a work-related injury or illness.

Claimant properly reported her absence on August 16, 2023 to the employer in accordance with the reporting policy. Claimant's absence on August 16, 2023 put her at 9 attendance point infractions. The claimant was discharged from employment on August 17, 2023 due to attendance violations.

The claimant has since been reinstated to the same position, full-time EMT, and at the same rate of pay effective August 22, 2023. This reinstatement occurred once the employer received Family and Medical Leave Act (FMLA) paperwork from the claimant.

The claimant had filed an original claim for unemployment insurance benefits with an effective date of August 13, 2023 (the Sunday of the week in which an application for benefits is filed). No unemployment insurance benefits have been paid to the claimant to date on the claim.

The employer's witness Teri Papesh participated by telephone in the fact-finding interview that Iowa Workforce Development held on September 5, 2023. Ms. Papesh provided the interviewer with information about the August 16, 2023 absence of the claimant and her discharge from employment due to attendance point accruals.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code section 96.5(2)a & d provide in pertinent part:

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.

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

The employer has the burden of proof in establishing disqualifying job-related misconduct.¹ In unemployment insurance benefits cases, the issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance

¹ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

benefits.² What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions.³

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.⁴ Such misconduct must be “substantial.”⁵ Excessive absences are not considered misconduct unless unexcused.⁶ 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.⁷ Medical documentation is not essential to a determination that an absence due to illness should be treated as excused.⁸

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.⁹ The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive.¹⁰ The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.¹¹

Second, the absences must be unexcused.¹² The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused because it was not for “reasonable grounds”.¹³ An absence can also be unexcused because it was not “properly reported.”¹⁴ Excused absences are those “with appropriate notice”.¹⁵

Absences in good faith, for good cause, with appropriate notice, are not misconduct.¹⁶ They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer’s interest is not shown and this is essential to a finding of misconduct.¹⁷ *Id.* Further, a discharge for misconduct cannot be based on a past act, it must be based upon a current act.¹⁸

The credible evidence establishes that the claimant was ill and properly reported her final absence from work on August 16, 2023. Claimant did not engage in any final acts that were substantial and would rise to the level of job-related misconduct.

² *Infante v. Iowa Dep’t of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

³ *Pierce v. Iowa Dep’t of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

⁴ *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

⁵ *Id.*

⁶ *Cosper*, 321 N.W.2d at 10.

⁷ *Gaborit v. Emp’t Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

⁸ *Id.* at 558.

⁹ 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.”

¹⁰ *Sallis v. Emp’t Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).

¹¹ *Higgins*, 350 N.W.2d at 192 (Iowa 1984).

¹² *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

¹³ *Higgins*, 350 N.W.2d at 191.

¹⁴ *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

¹⁵ *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

¹⁶ *Id.*

¹⁷ *Id.*

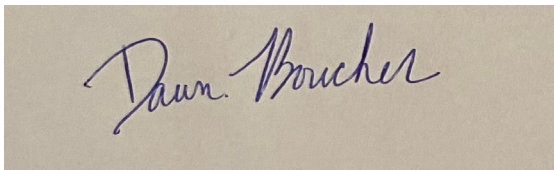
¹⁸ Iowa Admin. Code r.871-24.32(8).

The separation from employment is not disqualifying and benefits are allowed, provided the claimant is otherwise eligible. The issues of overpayment and chargeability are moot because benefits are allowed, and the employer's account may be subject to charges.

Note to the parties: Charges to the employer's account will only potentially accrue if the claimant files weekly continued claims for benefits and is paid those benefits.

DECISION:

The September 6, 2023 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason on August 16, 2023. Unemployment insurance benefits are allowed, provided the claimant remains otherwise eligible. The issue of overpayment is moot as no benefits have been paid to date and benefits were allowed. The employer's account may be charged for benefits paid.

A rectangular area containing a handwritten signature in blue ink that reads "Dawn Boucher".

Dawn Boucher
Administrative Law Judge

October 5, 2023
Decision Dated and Mailed

db/te

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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. *There is no filing fee to file an appeal with the Employment Appeal Board.*

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 file a petition for judicial review in district court.

2. If you do not file 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 www.iowacourts.gov/efile. *There may be a filing fee to file the petition in District Court.*

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: 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. *No hay tarifa de presentación para presentar una apelación ante la Junta de Apelación de Empleo.*

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 no presenta una apelación de la decisión del juez ante la Junta de Apelación de Empleo dentro de los quince (15) días, la decisión se convierte en una acción final de la agencia y tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días. Puede encontrar información adicional sobre cómo presentar una petición en www.iowacourts.gov/efile. *Puede haber una tarifa de presentación para presentar la petición en el Tribunal de Distrito.*

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.