

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NANCY K ALLEN
Claimant

FIVE STAR QUALITY CARE INC
Employer

APPEAL 19A-UI-06681-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/28/19
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:

The employer/appellant, Five Star Quality Care Inc., filed an appeal from the August 15, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 17, 2019. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Cheryl Runyan, administrator. Jess Calhoon, payroll, also testified. Employer Exhibits 1-6 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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: The claimant was employed full-time as a licensed practicing nurse (LPN) and was separated from employment on July 1, 2019, when she was discharged for excessive absenteeism (Employer Exhibit 2). The claimant last performed work on June 7, 2019.

The employer has a no-fault attendance policy which designates point values to unplanned absences, regardless of reason, and upon accumulating nine points in a rolling twelve month period, an employee is subject to discharge (Employer Exhibit 6). The employer’s policy also requires an employee to call off two hours prior to a shift, and does not allow employees who

have communicable disease to work. The claimant was trained on employer policies most recently in April 2019 (Employer Exhibit 5). The employer provided the following chronology of the claimant's attendance:

November 27, 28, 30, 2018	1 occurrence
December 2, 3, 2018	1 occurrence
December 19, 20, 2018	1 occurrence
December 29, 30, 31, 2018	1 occurrence
April 15, 2019	1 occurrence
April 22 - May 7, 2019	FMLA
June 10, 2019 (illness)	1 occurrence
June 11 - 25, 2019	FMLA
June 26, 2019 (illness)	1 occurrence
June 28, 2019 (illness)	1 occurrence

Because the employer's policy is a "no-fault" policy, the reason for each absence was not recorded. Prior to discharge, the claimant received a warning on August 1, 2018 (Employer Exhibit 3) and January 14, 2019 (Employer Exhibit 4) for her attendance. The claimant had been expected to return from FMLA and return to work on June 26, 2019. That day, her husband called the employer to report the claimant was vomiting and had a sore throat and would not be in. The employer did not consider the absence to be properly reported. On June 28, 2019, the employer called the claimant who stated she was still vomiting and had a sore throat and would not be able to work her weekend shifts. She was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,212.00, since filing a claim with an effective date of July 28, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

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

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 provides, in relevant part:

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 of misconduct 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). 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 the 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 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. 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. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The administrative law judge is persuaded the claimant's final absences on June 26, and 28, 2019 would be considered excused absences and properly reported. On June 26, 2019, the claimant's husband called to report the claimant would be absent and that she was vomiting and with a sore throat. Under these circumstances, the administrative law judge is persuaded the claimant made a good faith effort to report her absence while she was ill. Then the employer called the claimant to inquire about her absences for June 28 and the weekend. The claimant was still sick and acknowledged she could not work that day or her upcoming weekend shifts, which caused her to point out. The administrative law judge is persuaded that the employer's policy prohibiting the claimant to work if she was vomiting/possibly contagious cannot be ignored either. In this case, if the claimant reported to work while contagious and vomiting, she violated the employer's policy. If the claimant did not report to work because she was vomiting, she violated policy. Either way, the claimant would have violated employer policy if she worked her shifts on June 26 or 28. The administrative law judge is persuaded that her final absence was properly reported and for reasonable grounds.

Because her last absence was 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, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The August 15, 2019 (reference 01) initial decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn