IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RHEA MEINDERS Claimant **AMAZON.COM SERVICES INC** Employer	**APPEAL 22A-UI-04011-SN-T** **ADMINISTRATIVE LAW JUDGE** **AMENDED DECISION** **OC: 01/02/22** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Amazon.com Services Inc., filed an appeal from the January 26, 2022, (reference 02) unemployment insurance decision that denied benefits based upon the conclusion he had been discharged for work-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on March 15, 2022. The claimant did not participate. The employer participated through Human Resources Generalist Greg Link. Official notice was taken of the agency records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repaying the benefits received due to the employer's inadequate participation at the fact-finding stage?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked as a fulfillment associate from July 19, 2021, until her employment ended on December 5, 2021, when she was discharged. The claimant initially worked in a full-time capacity. The claimant later switched to work in a part-time flex shift capacity on October 3, 2021. The claimant's immediate supervisor was Area Manager Alexander Houseal.

The employer has an attendance policy. The attendance policy assesses points after each attendance incident. If an employee is more than five minutes late, then they receive one attendance point. If an employee misses a shift, then he or she receives two points. If an employee cancels their shift less than 16 hours before the start of their shift, then he or she receives two points. An employee can only accrue two points in a day. Points roll off the

employee's record after a 60-day period. The claimant acknowledged receipt of the employer's policy. The employer provided a copy of its attendance policy for full-time workers and the claimant's acknowledgement of it. In this role, the claimant was required to work at least 30 hours per week, or an attendance point would be assessed against her for that reason. If an employee accrues seven points or more, then they are terminated. Flex employees are shown an addendum when they switch to this role, which outlines this variation from the attendance policy for full-time employees. The points system described above is also something that is used only with flex time employees. Mr. Link read the addendum into the record. (Exhibit 1)

On July 29, 2021, the claimant received a warning regarding her attendance. The claimant was informed she receives 20 hours of unpaid personal time (UPT). It further informed her that she only had seven UPT hours left in her bank. The warning stated if the claimant reached zero UPT hours left in her bank, then she would be terminated. The employer provided a copy of this warning. (Exhibit 2)

On October 3, 2021, the claimant switched to a 30-hour per week flex time position. At that time, the claimant was presented with the addendum to the employer's attendance policy and acknowledged receipt of it.
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On October 28, 2021, the claimant arrived at work nine minutes late for her shift that day.

On November 1, 2021, the claimant arrived at work six minutes late for her shift that day.

On November 10, 2021, the claimant arrived at work thirty-four minutes late for her shift that day.

On November 15, 2021, the claimant dropped a shift beginning at 3:30 p.m. later that day at 5:21 a.m.

On November 19, 2021, the claimant arrived at work thirteen minutes late for her shift that day. The claimant then left for the day three hours and 59 minutes prior to the end of her shift. The claimant did not inform management that she would be leaving early that day.

On November 23, 2021, the claimant had accrued the requisite points under the employer's policy to warrant termination. The employer schedules what are called "seek to understand conversations" with an employee after they have accrued the requisite points for termination to ensure that there are not mitigating circumstances.

On November 27, 2021, the claimant did not work the minimum 30 hours she needed to work for that week. As a result, the claimant was assessed an attendance point.

On November 29, 2021, the employer's corporate human resources department sent an email to the claimant regarding a seek-to-understand conversation. The claimant did not respond to that email.

On December 1, 2021, the employer's corporate human resources department sent an email to the claimant regarding a seek-to-understand conversation. The claimant did not respond to that email.

On December 2, 2021, the employer's corporate human resources department forwarded the matter on to the site's human resources department. The claimant gave the site's human resources department the following justification, "Any issues on my end were [sic] Amazon app

not working correctly." The employer rejected the claimant's justification because it did not have record of other employees experiencing a glitch. It also determined that a glitch could not explain an attendance history spanning two months of time. Finally, the claimant did not specifically describe what the glitch was and how it could explain her attendance.

On December 3, 2021, the claimant arrived at work six minutes late for her shift that day.

On December 5, 2021, the employer's Human Resources Regional Center (HRRC) reviewed the claimant's attendance history. HRRC Lead Tony Olbiera discharged the claimant because her attendance was poor.

The following section describes the findings of fact necessary for the overpayment issue:

The parties were sent a notice of factfinding on January 20, 2022 for an interview occurring on January 26, 2022. The employer designated an agent of corporate cost control, Paula Tierney, as its representative at factfinding. The administrative record KFFD indicates the representative left a voicemail for the agent to call him back within 30 minutes. There is nothing in record to suggest the employer ever returned this call.

The claimant filed for and received five full weekly benefit payments of $258 from January 9, 2022 through February 5, 2022 for a total of $1,290.00.

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. The employer will absorb the overpayment because it did not participate at factfinding and it is not excused from doing so due to agency error.

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 provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Department of Job Service*, 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.
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> 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.
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> 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.
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> (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 unrebutted 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.

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

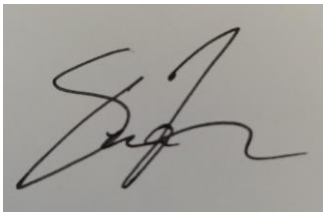
not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate 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 left a third-party agent as its contact for factfinding. The record reflects that agent was not available for the call, even though Iowa Workforce Development Department sent a notice of factfinding to the parties. As a result, the employer's account (#599216) will absorb the resulting overpayment.

DECISION:

The January 26, 2022, (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. 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 overpayment issue is moot because the claimant was not paid benefits.

The claimant has been overpaid unemployment insurance benefits in the amount of $1,290.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview. Its non-participation was not explained by an error on the part of Iowa Workforce Development Department. As a result, the employer's account will absorb the overpayment. Any overpayment decision issued by the Benefits Bureau purportedly resulting from this decision is null and void.



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April 13, 2022
Decision Dated and Mailed

smn/mh