IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KEVIN L HARRIS Claimant **HORMEL FOODS CORPORATION** Employer	**APPEAL 19A-UI-00841-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/06/19** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – 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 filed an appeal from the January 22, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 13, 2019. Claimant participated and testified. Employer participated through Hearing Representative Jackie Nolan and Human Resource Manager Roberto Luna. Employer's Exhibits 1 through 3 and claimant's Exhibit A were received into evidence. Official notice was taken of the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying misconduct?
Has the claimant been overpaid benefits?
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on October 31, 2018. Claimant last worked as a full-time production worker. Claimant was separated from employment on January 8, 2019, when he was discharged.

The employer has a points-based attendance policy in place. (Exhibit A). Under the policy employees are issued one point for each absence and a half point for each tardy or early out. After four points employees receive a written warning and they are discharged if they accumulate nine points within a rolling 12-month period. Claimant received a copy of the attendance policy upon his hire. Luna testified employees in their probationary period are discharged at six points. Claimant testified he was not aware probationary employees were allowed less points prior to termination and that information does not appear in the attendance policy.

On November 6 claimant was absent from work because he could not find his car keys. He was late to work on November 17 and absent on November 26 due to weather. Claimant was not issued points for the November 26 absence. Claimant was also absent November 28 and 29, but could not remember why. Claimant was absent December 11 through December 13 because his car was purportedly stolen while he was in Kansas City. Claimant could not produce a police report, insurance report, or other documentation supporting this claim. Had claimant produced any documentation supporting his claim, his points would have been reduced. This brought claimant to six and a half points. Claimant was not, however, issued any sort of warning or disciplinary action regarding his attendance.

Claimant's final absences occurred December 26 through December 28 and were due to illness. The employer offered claimant the opportunity to produce a doctor's note to remove some of the points, but he was not able to provide such documentation. Claimant testified he does not have insurance and therefore could not go to the doctor. All of claimant's absences were properly reported under the employer's policies. Claimant was advised by the human resource coordinator, Miguel Abaricio, that if he could provide documentation for his December absences his points could be adjusted and reduced. Luna reiterated this to claimant on January 7, 2019 and advised him that a failure to provide documentation by the next day would result in termination. As claimant failed to provide such documentation, he was discharged from employment. Claimant testified he had not previously been told him job was in jeopardy due to his attendance.

The claimant filed a new claim for unemployment insurance benefits with an effective date of January 6, 2019. The claimant filed for and received a total of $1,513.00 in unemployment insurance benefits for the weeks between January 6 and February 9, 2019. The employer did not participate in a fact finding interview regarding the separation on January 18, 2019 because it never received a call. The fact finder determined claimant qualified for benefits.

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 § 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(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 Dep't of Job Serv.*, 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.

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*, 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.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's no-fault absenteeism policy or point system 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 Iowa Employment Security Law because it is not

volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Aside from the November 26 absence, for which he was not issued points, claimant's November absences are all attributable to issues of personal responsibility and therefore are not excused. Similarly, as claimant has failed to provide sufficient evidence excusing his December 11 through 13 absences or provide a reasonable explanation as to why he was unable to obtain supporting documentation those absences are therefore excused. Claimant's final absences were due to illness. Claimant provided a reasonable explanation as to why he was not able to obtain a doctor's note. Because his 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, without such, the history of other incidents need not be examined.

Additionally, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The January 22, 2019, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs