

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**DEVIN P MCVEY**  
Claimant

**DECKER TRUCK LINE INC**  
Employer

**APPEAL 15A-UI-14109-SC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/29/15  
Claimant: Respondent (1R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
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:**

Decker Truck Line, Inc. (employer) filed an appeal from the December 17, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it discharged Devin McVey (claimant) for excessive absences related to properly reported illness which is not misconduct. The parties were properly notified about the hearing. A telephone hearing was held on January 13, 2016. The claimant was registered for the hearing but did not answer when contacted at that number. He called the Appeals Bureau at 8:12 a.m. and verified his phone number with the clerk who answered the phone. The clerk re-entered his phone number as a late call. However, when the administrative law judge called the phone number provided the person who answered stated that was not the claimant's phone number. The claimant did not contact the Appeals Bureau again during the hearing and the record closed without his participation. The employer participated through Vice President of Human Resources Brenda McNealey and Health and Benefits Manager Andrea Klobberdanz. Employer's Exhibits 1 through 4 were received.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 flatbed truck driver beginning on January 21, 2015, and his last day worked was October 23, 2015.

On October 27, 2015, the claimant did not call his dispatcher for his job assignment. The dispatcher contacted Health and Benefits Manager Andrea Kloberdanz and explained that this had happened in the past. Kloberdanz contacted the claimant to discuss the situation. He explained he was having difficulty sleeping and often felt tired on the road. Kloberdanz determined this was a safety issue and placed the claimant on a leave of absence until he was cleared to drive by the employer's physician.

The claimant saw his doctor on October 30, 2015 who placed him on medication to assist with his sleeping issues. The claimant then contacted Kloberdanz to update her on the appointment with his doctor. Kloberdanz reminded him that he would still need to be cleared to return to work by the employer's doctor. On November 2, 2015, Kloberdanz contacted the claimant to notify him that she had scheduled him an appointment with the employer's doctor on November 4, 2015. The claimant agreed to attend the appointment. On November 4, 2015, the employer's doctor did not clear the claimant to return to work. He wanted additional medical records and a follow-up appointment with the claimant to determine his ability to work.

The claimant was not eligible for job-protected leave under the Family Medical and Leave Act (FMLA). However, the employer offers 30 days of unpaid leave to all non-FMLA eligible employees. The claimant had previously used some of that leave and by October 27, 2015, he only had eight days of leave left. On November 6, 2015, the employer determined that the claimant's leave had expired on November 4, 2015. Kloberdanz sent him a letter the same day explaining his leave had expired. On November 10, 2015, Kloberdanz and Vice President of Human Resources Brenda McNealey called the claimant and notified him that he was discharged as he had not been released to work and his leave time had expired. The employer did not know at that time if the claimant had provided the medical information to its doctor or if he had a follow-up appointment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,620.00, since filing a claim with an effective date of November 29, 2015, for the five weeks ending January 2, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

#### **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. Benefits are allowed.

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(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). 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 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 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, 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. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. 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, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**DECISION:**

The December 17, 2015, (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. The issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**REMAND:**

While the claimant's separation is a qualifying separation, the issue of whether he is able and available for work is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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