

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

COLEASE STURGES

Claimant

APPEAL 22A-UI-03686-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES

Employer

OC: 12/12/2021

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, Care Initiatives, filed an appeal from the January 24, 2022, (reference 02) unemployment insurance decision that granted benefits based upon because the claimant was discharged for non-disqualifying conduct. The parties were properly notified of the hearing. A telephone hearing was held on March 10, 2022. The claimant participated and testified. The employer participated through Administrator Kari Gearst and Director of Nursing Chantilly Barr. Exhibits 1, 2, 3, 4, and 5 were received into the record. Official notice was taken of the administrative records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant was overpaid for benefits?

Whether the claimant is excused from repayment 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 certified nursing assistant from May 18, 2021, until the employer ended on August 23, 2021, when she was discharged. The claimant's immediate supervisor was Director of Nursing Chantilly Barr. The claimant worked a schedule beginning at 10:00 p.m. and ending at 6:00 a.m.

The employer has an employee handbook. The employee handbook contains an attendance policy. The policy differentiates the imposition of discipline for new employees. If an employee is in their first 90 days of employment, then they receive a verbal warning after one attendance

incident, a written warning after the second incident, and termination after the third incident. The claimant reviewed these policies shortly after her hire during orientation. The claimant acknowledged receipt of the employee handbook on May 19, 2021. (Exhibit 5)

The claimant called in prior to her shifts occurring on June 19, 2021, June 20, 2021, June 22, 2021, June 23, 2021, June 24, 2021, and June 25, 2021. The claimant explained to Director of Nursing Rachel (last name unknown) that she was helping a relative who was in the hospital due to a heart attack. The claimant gave updates each morning regarding whether she would return to working her shifts on those days.

On July 31, 2021, the claimant called in to work at 2:15 p.m. The claimant informed the employer that she was in Omaha and did not have transportation to return for her shift beginning at 10:00 p.m. One of the claimant's tires had a blowout. The claimant did not give these details to the employer.

On August 3, 2021, the claimant received a final warning. The employer provided a copy of the final warning. In a section labeled "description of infraction," the final written warning displayed the following sentence, "Next [sic] absence within 90 days will result in further discipline up to and including termination." [Emphasis in original] In a section titled "corrective action," the final written warning displayed the following sentence, "As per the policy [,] [claimant] will be required to make up the weekend missed. Also needs to not miss any more days within this 90-day period." (Exhibit 3)

On August 8, 2021, the claimant went home early at 4:45 a.m. because she was nauseated and had been vomiting at work.

On August 19, 2021, the claimant worked from 10:00 p.m. to 6:20 a.m. the following morning. The claimant had appointments with her doctor, dentist, and hair stylist in her hometown roughly four and a half hours away the following day. The dentist and doctor appointments were regular checkups. The claimant had previously requested to use vacation on August 20, 2021 but had not received approval for it. Nevertheless, the claimant drove to her hometown with the intent of attending these appointments, driving back, and working another overnight shift.

At 4:36 p.m. on August 20, 2021, the claimant's mother called in to work for the claimant for a shift occurring that night. The claimant's mother explained that the claimant had not slept for a considerable amount of time. She explained she was calling in for the claimant because the claimant had been told that if she called in one more time that she would be terminated.

On August 23, 2021, Administrator Kari Gearst terminated the claimant for excessive absenteeism. The employer provided a copy of the claimant's termination notice. (Exhibit 1)

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

A notice of fact-finding was sent to the parties on January 6, 2022, informing them of a fact-finding interview scheduled to occur at 8:50 a.m. on January 13, 2022.

On January 11, 2022, Equifax Hearing Representative Lisa Durnell sent a written statement to Iowa Workforce Development Department through the State Information Data Exchange System (SIDES) stating the employer discharged the claimant for excessive absenteeism. The statement gave Ms. Durnell's contact information. Exhibits 1, 2, 3, 4 and 5 were attached to this statement.

The claimant has not received benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to excessive absenteeism. The overpayment issue is moot because the claimant did not receive benefits.

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.

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.

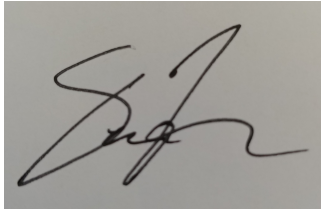
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited 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. In particular, the claimant's absence on August 23, 2021 cannot be evaluated because it was properly reported as due to illness.

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. The administrative law judge finds the final absence to be particularly egregious. The claimant drove hours away from her work after an overnight shift knowing that her request to have the day off had not been approved. The claimant had no reasonable expectation of being able to work the shift on August 20, 2021, given her choice to go forward with her appointments. Benefits are withheld.

DECISION:

The January 24, 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.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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March 29, 2022
Decision Dated and Mailed

smn/kmj