IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CARISSA J ESSICK Claimant **HOLTON ORAL AND MAXILLOFACIAL SUR** Employer	**APPEAL 24A-UI-02253-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/01/23** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

Holton Oral and Maxillofacial Surgery, the employer/appellant,[1] appealed the Iowa Workforce Development (IWD) February 15, 2024 (reference 03) unemployment insurance (UI) decision. IWD found Ms. Essick eligible for REGULAR (state) UI benefits because IWD concluded the employer dismissed her from employment on January 28, 2024 for a reason that did not disqualify her from receiving UI benefits. On March 1, 2024, the Iowa Department of Inspections, Appeals, and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to the employer and Ms. Essick for a telephone hearing scheduled for March 21, 2024.

The administrative law judge held a telephone hearing on March 21, 2024. The employer participated in the hearing through Ahsley Butler, office manager, and Adam Holton, DDS/president. Ms. Essick participated in the hearing personally. The administrative law judge took official notice of the administrative record. Ms. Essick submitted documents via fax and email to the DIAL, UI Appeals Bureau about fifteen minutes before the hearing, but she did not send the documents to the employer. The administrative law judge did not admit Ms. Essick's documents as evidence since she did not send them to the employer, and she sent them on the day of the hearing.

ISSUES:

Did the employer discharge Ms. Essick from employment for disqualifying job-related misconduct?
Did IWD overpay Ms. Essick UI benefits?
If so, should she repay the benefits?

FINDINGS OF FACT:

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact, to determine the credibility of witnesses,

[1] Appellant is the person or employer who appealed.

weigh the evidence and decide the facts in issue.[2] The administrative law judge may believe all, part or none of any witness's testimony.[3] In assessing the credibility of witnesses, the administrative law judge should consider the evidence using their own observations, common sense and experience.[4] In determining the facts, and deciding what testimony to believe, the administrative law judge 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 conduct, age, intelligence, memory and knowledge of the facts; the witness's interest in the trial, and the witness's motive, candor, bias and prejudice.[5]

The following findings of fact show how the administrative law judge has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses, considered the applicable factors listed above, and used his own common sense and experience. The administrative law judge did not consider the Dr. Holton's testimony from the hearing because the administrative law judge, inadvertently, did not swear in Dr. Holton. Had the administrative law judge considered Dr. Holton's testimony it would not have changed the outcome of this case as Dr. Holton's testimony was repetitive of Ms. Butler's testimony.

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Essick began working for the employer on November 13, 2023. She worked as a full-time dental assistant. Her employment ended on January 19, 2024.

Ms. Essick was absent from work Monday, January 15 through Thursday, January 18. Ms. Essick contacted Ms. Butler each day she was absent, and she sent Ms. Butler a doctor's note on January 17 that excused her from work January 15-18. The employer's policy requires an employee to call in for each absence and provide a doctor's note for two or more absences due to illness. Ms. Essick acknowledged receiving a copy of the policy on her hire date.

Ms. Essick had been absent several days before January 15. The employer never gave her any warning about these absences. The employer concluded that Ms. Essick's was absent too much and decided to terminate her employment.

Ms. Essick returned to work on Friday, January 19. At the end of her shift that day, Ms. Butler called Ms. Essex into the office and terminated her employment. Ms. Butler told Ms. Essick that her employment was terminated because she was not a good fit for the employer.

Since January 19, no medical provider has advised Ms. Essick to stay home from work. Ms. Essick has applied for jobs each week for which she has applied for UI benefits. Ms. Essick wants to obtain a new job.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Ms. Essick from employment on January 19, 2024 for a reason that does not disqualify her from receiving UI benefits, and Ms. Essick is able to and available for work.

<u>The Employer Has Not Established Disqualifying, Job-Related Misconduct on the Part of Ms. Essick</u>

---

[2] *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007).
[3] *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).
[4] *Id.*
[5] *Id*.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

> 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:
>
> 8. 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.
>
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:
>
> …
>
> (9) Excessive unexcused tardiness or absenteeism.

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

> (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**. [Emphasis added.]
>
> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

Excessive absenteeism is not considered misconduct unless the absences are also unexcused. 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. The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive.[6] The determination of whether absenteeism is excessive

[6] Sallis v. Emp't Appeal Bd., 437 N.W.2d 895 (Iowa 1989).

necessarily requires consideration of past acts and warnings.[7] Second, the absences must be unexcused.[8] The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," or because it was not "properly reported."[9]

An employer's no-fault absenteeism policy or point system does not, on its own, decide the issue of qualification for UI benefits. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not voluntary. This is true 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.[10] Medical documentation is not essential to a determination that an absence due to illness should be treated as excused.[11] Absences related to other issues such as transportation, lack of childcare, and oversleeping are not considered excused.[12] When a claimant does not provide an excuse for an absence the absences is deemed unexcused.[13]

The employer has the burden of proof in establishing disqualifying job misconduct.[14] The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.[15] Misconduct must be "substantial" to warrant a denial of job insurance benefits.[16]

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The most recent incident leading the employer to discharge Ms. Essick must be a current act of misconduct to disqualify her from receiving UI benefits. The most recent act for which the employer terminated Ms. Essick's employment was because she was absent January 15-18. Ms. Essick properly reported these absences to the employer, gave the employer a doctor's note excusing her for these absences, and her absences were for a good cause reason – illness. These absences are excused and are not misconduct. The employer has not established a current act of misconduct on the part of Ms. Essick,

Ms. Essick is Able to and Available for Work as of January 19, 2024

Iowa Code section 96.4(3) provides:

---

[7] Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 192 (Iowa 1984).
[8] *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982).
[9] Higgins, 350 N.W.2d at 191; Cosper, 321 N.W.2d at 10.
[10] Iowa Admin. Code r. 871-24.32(7); Cosper, 321 N.W.2d at 9; Gaborit v. Emp't Appeal Bd., 734 N.W.2d 554 (Iowa Ct. App. 2007).
[11] *See Gaborit*, 734 N.W.2d at 555-558.
[12] *Higgins*, 350 N.W.2d at 191.
[13] *Id*.; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).
[14] *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).
[15] *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).
[16] *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

> Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(35) provide:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood."[17] "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides."[18] A person claiming benefits has the burden of proof that she is be able to work, available for work, and earnestly and actively seeking work.[19]

In this case, Ms. Essick's doctor released her to return to work as of January 19, 2024. Ms. Essick is otherwise ready to go to work. Ms. Essick has established that she is able to and available for work.

---

[17] *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1).
[18] *Sierra* at 723.
[19] Iowa Admin. Code r. 871-24.22.

Since the employer has not established disqualifying, job-related misconduct on the part of Ms. Essick and she is able to and available for work, Ms. Essick is eligible for UI benefits, as long as no other decision denies her UI benefits.

Since Ms. Essick is eligible for REGULAR (state) UI benefits per this decision, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.[20]

DECISION:

The February 15, 2024 (reference 03) UI decision AFFIRMED. The employer discharged Ms. Essick from employment on January 19, 2024 for a reason that does not disqualify her from receiving UI benefits. Ms. Essick is eligible for UI benefits, as long as no other decision denies her UI benefits.

Daniel Zeno
Administrative Law Judge

March 22, 2024
Decision Dated and Mailed

scn

[20] *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf or by contacting the District Court Clerk of Court https:///www.iowacourts.gov/iowa-courts/court-directory/.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf o comunicándose con el Tribunal de Distrito Secretario del tribunal https:///www.iowacourts.gov/iowa-courts/court-directory/.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.