

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEON HOLLIS
Claimant

ECONOMY COATING SYSTEMS INC
Employer

APPEAL 18A-UI-02337-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/21/18
Claimant: Respondent (1)

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:

The employer filed an appeal from the February 8, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 16, 2018. The claimant did not participate. The employer participated through Human Resource Assistant Dwayne Sampson. Employer's Exhibits 1 through 6 were received into evidence. Official notice was taken of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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: Claimant was employed full time as a grit blaster from February 25, 2016, until this employment ended on January 22, 2018, when he was discharged.

On January 17, 2018, claimant received a reprimand from the quality assurance team. Claimant was very upset about this reprimand and as he was walking out told some of his coworkers he would not be at work the next day. Claimant then called in on January 18 and 19. When claimant returned to work he told the employer he missed work the previous two days because he was sick. The employer conceded that claimant does suffer from a chronic recurring illness that has caused him to miss work before. However, Sampson testified the employer doubted the veracity of claimant's claims that he was sick on January 18 and 19 due to the fact that the absences immediately followed a reprimand and based on claimant's statement to his coworkers on January 17 that he would not be in the next day.

The employer has a points-based attendance policy in place, which allows employees to accumulate ten attendance points within a rolling calendar year prior to being discharged. (Exhibit 6). Claimant was aware of this policy. Claimant's absences on January 18 and 19 put him at five and a half attendance points for the rolling calendar year. Claimant had received warnings about his attendance previously, with the most recent warning occurring on January 3, 2018. However, claimant was never advised that he could be discharged prior to reaching ten attendance points. The employer ultimately chose to discharge claimant prior to him reaching ten attendance points due to the circumstances surrounding his final two absences and their belief that the absences were attributable to him being upset about the reprimand, rather than due to illness.

The claimant filed a new claim for unemployment insurance benefits with an effective date of January 21, 2018. The claimant filed for and received a total of \$1,959.00 in unemployment insurance benefits for the weeks between January 21 and March 10, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on February 7, 2018. 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.

- 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. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. Here, claimant was discharged after he was absent from work on January 18 and 19, 2018. Claimant reported to the employer that he was absent due to illness. If the last absence was related to properly reported illness or other reasonable grounds, there is no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct, without such, the history of other incidents need not be examined and benefits are allowed.

The employer provided testimony bringing into question claimant's assertion that his final two absences were due to illness, but rather were because he was upset following a reprimand. The employer relied heavily on the timing of the absences in relation to the reprimand and claimant's statement to his coworkers that he was not coming in the next day. The employer also conceded, however, that claimant had a chronic medical condition, which often caused him to miss work. Furthermore, the final two absences only brought claimant to five and a half attendance points. The employer's policy allows employees to accumulate ten points prior to termination. Claimant was never advised that he was in danger of being terminated prior to reaching ten attendance points, nor was he directed to either report to work or provide a medical excuse on either of the days in question.

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. Here, the claimant was not given adequate opportunity to correct the behavior the employer felt was inappropriate or provide documentation that he was being truthful about his illness. 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 February 8, 2018, (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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs