

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ZACHARY T GUITER**  
Claimant

**APPEAL 19A-UI-06275-CL-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RAILSERVE INC**  
Employer

**OC: 07/07/19**  
**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:**

On August 9, 2019, the employer filed an appeal from the July 30, 2019, (reference 01) unemployment insurance decision that allowed benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on August 30, 2019. Claimant participated. Employer participated through site leader Shane Callahan. Employer's Exhibits 1 through 2 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 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 began working for employer on October 1, 2018. Claimant last worked as a full-time operator/helper. Claimant was separated from employment on July 10, 2019, when he was terminated.

Employer has an attendance policy. The policy requires employees who will be absent to report the absence to the site leader at least four hours prior to the shift. Employees were also allowed to report the absence to the site leader's assistant. The policy also states that excessive absences are tardiness will result in discipline up to and including termination. Claimant was aware of the policy.

Employer excused absences for illness only when the employee provided a doctor's note.

On May 8, 2019, claimant missed a mandatory safety meeting. On May 14, 2019, employer gave claimant a written warning for missing the meeting.

On June 3, 2019, claimant was absent from work due to lack of transportation. On June 6, 2019, employer gave claimant a written warning for his absence. Employer also documented that it would suspend claimant, but never actually did so due to staffing issues.

On July 5, 2019, claimant was absent due to illness. Claimant properly reported the absence. When claimant returned to work he informed employer he was having issues with his heart, blood pressure, and migraines.

On July 9, 2019, claimant became extremely ill on his way to work. Claimant called his friend to pick him up and bring him to the emergency room. Claimant called the site leader's assistant, Martin Wilson, to report the absence. However, the phone rang and rang and claimant was not able to speak with Wilson or leave a voice message. Claimant went to the Emergency Room and was not discharged until the next morning.

On July 10, 2019, claimant called employer to report what had happened. Employer acknowledged Wilson had a missed call from claimant, but terminated his employment.

### **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.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused.

*Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

In this case, claimant's last absence was due to an emergency medical condition. Claimant attempted to report the absence before he was admitted to the Emergency Room. However, Wilson's phone was apparently malfunctioning. Claimant's efforts were reasonable in the context of the situation, especially given the fact that employer was aware claimant had the medical condition. The last absence is considered excused under employment security law.

Claimant's absence on July 5, 2019, is also considered excused as it pertains to employment security law as it was for illness and claimant properly reported the absence.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because his last two absences were excused, 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. Accordingly, benefits are allowed.

Because benefits are allowed, the issues regarding overpayment are moot and will not be discussed further in this decision.

#### **DECISION:**

The July 30, 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.

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Christine A. Louis  
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Decision Dated and Mailed

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