

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**APRIL M PRUGH**

Claimant

**APPEAL 17A-UI-02565-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**

Employer

**OC: 02/05/17**

**Claimant: Respondent (1)**

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

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

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 24, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged for no disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on March 30, 2017. The claimant, April M. Prugh, participated. The employer, Care Initiatives, participated through Phyllis Farrell, Unemployment Insurance Consultant; Nicole Bosley, Business Office Manager; and Laura Lewis, Environmental Supervisor; and Alyce Smolsky of Equifax represented the employer. Employer's Exhibits 1, 1A, 2, 3, and 3A were received and admitted into the record.

**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: Claimant was employed part time, most recently as a housekeeping aide, from September 14, 2016, until February 10, 2017, when she was discharged for excessive absenteeism. At some point in the fall of 2016, claimant experienced a work-related injury and was returned to work with restrictions. Claimant last reported to work on December 23, 2016. On or about January 3, 2017, claimant was in a motor vehicle accident and remained out of work until she was discharged. Claimant's absences included January 2, 9, 14, 15, 23, 28, and 29. Lewis testified that claimant was not scheduled for any shifts in February, as the employer knew she was not able to work at that time.

The parties dispute the date that the employer became aware of claimant's doctor's note taking her off work. (Exhibit 2) Claimant testified that she brought in this note the day she went to the doctor. Bosley testified claimant brought in this note on or about February 8, 2017. Claimant also testified that another doctor gave her a note that she was able to work with restrictions. Claimant provided this note to the employer during a meeting on February 6, but the employer did not make and does not have a copy of the note. The parties gave conflicting testimony regarding whether claimant was reporting her absences during 2017. The employer testified that claimant reported some of her absences by contacting the former administrator. This person would then relay the information to Lewis. The employer does not know the dates on which claimant contacted the administrator, and it does not know what claimant reported when she called into work. Claimant testified that she contacted the former administrator on some occasions related to absences but stated she did not have to call her in January 2017 because of her doctor's note excusing her from work.

The employer provided a copy of the attendance policy. (Exhibit 3) The policy requires that an employee who is going to be absent must personally notify her supervisor at least two hours prior to her shift beginning. The policy also states that progressive corrective action steps will be taken for excessive absences. Claimant testified that she never received any warnings related to her attendance.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes 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).

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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder 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 appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events credible.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. It appears claimant's final absence was related to her personal illness following her car accident. Claimant provided the employer with medical documentation excusing her from work. Even if claimant did not provide that documentation until several days before her discharge, there is no evidence that she was ever asked to provide it or told that if she did not submit it sooner she would be subject to discipline or discharge. Because claimant's 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, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As claimant's separation is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

**DECISION:**

The February 24, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed