IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BETH E GUDENKAUF Claimant **SAFELITE SOLUTIONS LLC** Employer	**APPEAL 18A-UI-02548-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/28/18** **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:

Safelite Solutions, LLC (employer) filed an appeal from the February 15, 2018, reference 01, unemployment insurance decision that allowed benefits based upon the determination Beth E. Gudenkauf was discharged for excessive, unexcused absences related to illness that were properly reported which is not misconduct. The parties were properly notified about the hearing. A telephone hearing was held on March 21, 2018. The claimant participated. The employer was represented by People Business Partner Patricia Baldwin and participated through Operations Manager Annette Kohl, Job Coach Daniele Randle El, and Contact Center Assistant Manager Allison Todd. The Employer's Exhibits 1 and 2 were admitted without objection. The administrative law judge took official notice of the administrative record, specifically the fact-finding documents.

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: The claimant was employed full-time as a Customer Relations Representative beginning on June 16, 2016, and was separated from employment on January 25, 2018, when she was discharged. The employer has an attendance policy which states after eight absences it has the discretion to discharge an employee.

The claimant has two breathing impairments that affect her ability to breathe and the medication for one of the impairments can affect her blood sugar in a way that is not always correctable

with insulin. She went through the accommodation process and was allowed intermittent leave up to four days a month. Whether the leave was approved for four absences or occurrences, including partial days, or 32 hours of time missed was ambiguous. The employer believed it meant four absences or occurrences and did not count these against the claimant.

On January 3, 2018, the claimant received a final written warning related to tardiness. Her most recent tardy was the day before when she left work a half hour early due to illness after notifying her supervisor. The majority of the claimant's 16 absences, during the prior year, were related to illness and were properly reported. However, on December 21, 2017, the claimant left an hour early without notification to her supervisor when she was confused about the schedule. She also missed two days of work in October 2017 when her partner was having his leg amputated.

After her warning, the claimant missed four days of work and used up her accommodation allotment for the month. The claimant left work early on January 12, 13, and 20, due to illness after notifying her supervisor. The employer spoke to the claimant and told her that any further absences beyond her accommodation allotment would subject her to discharge.

On January 25, 2018, the claimant arrived late to work as she had been stopped by law enforcement and issued a ticket. She contacted Job Coach Daniele Randle El to notify her that she would be late. The claimant spoke to Randle El later that day to notify her that she was having difficulty breathing and ask if missing work would cause her to lose her job. Randle El stated she did not know and could not tell the claimant what to do. The claimant returned to work in an attempt to finish out her workday. However, her breathing did not improve and she left work to go to the Emergency Room. The claimant's employment was terminated the following day for attendance.

The administrative record reflects that the claimant has received unemployment benefits in the amount of $2,086.00, since filing a claim with an effective date of January 28, 2018, for the seven weeks ending March 17, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal. The employer did provide written documentation which included the contact information for a third-party representative who did not answer when called by the fact-finder, the claimant's acknowledgement of the employer's policies and procedures including the attendance policy, and the claimant's written warnings. The employer did not provide a copy of its attendance policy.

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. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "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). 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 the 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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 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, supra.*

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*.

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the claimant's version of events.

An employer's attendance policy 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 the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The claimant's final absence occurred when she left early on January 25, 2018, because she could not breathe. She left work and went to the hospital. The claimant notified her supervisor before leaving, rendering her absence properly reported and excused. Because her 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. As the employer has not established a current or final act of misconduct, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The February 15, 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. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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