IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KRISTOPHER G STANLEY Claimant **PELLA CORPORATION** Employer	**APPEAL 17A-UI-05781-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/07/17** **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 May 26, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 20, 2017. The claimant participated and testified. The employer participated through Human Resource Representative Miraldo Michel. Production Manager Jeremy Hamilton and Department Manager Nate Forseth were also present on behalf of the employer, but did not testify. Employer's Exhibit 1 through 15 were received into evidence.

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 an operator from March 10, 2015, until this employment ended on April 12, 2017, when he was discharged.

On March 14, 2017, claimant returned to work following an extended medical leave of absence due to an injury. Claimant worked that entire week, but found he was still having problems with his injury. The following week claimant called in to report he would not be in due to his injury. Claimant's normal work schedule was Monday through Thursday. Claimant called in each day beginning on Monday, March 20 through Friday, March 24 to report his absences. (Exhibit 9). Claimant also requested, and was approved for leave beginning on March 27. (Exhibit 1). The employer was also aware this leave was because of claimant's injury.

On March 25, 2017, members of claimant's department were scheduled for mandatory overtime. Claimant did not come in to work or call in that day. Claimant's supervisor called him and left a voicemail instructing him he needed to call in each day he was not going to be at work. Claimant then proceeded to call in each work day from March 27 through April 11, even though he was on an approved leave of absence. (Exhibit 9). Claimant testified he did not call or come to work on March 25 because he was unaware his department was working that day, as it was not a normal work day. Employees are generally notified of mandatory overtime the Thursday right before they were expected to work, but since claimant was not at work that day due to his injury, he did not receive this information. The employer confirmed no one informed claimant he was supposed to work on March 25, but testified it is the employee's responsibility to know what their schedule is. The employer testified there are no written policies or procedures dictating how employees are to get this information if they are not at work when it is shared with other staff. Claimant testified it was his understanding that because he called in the week immediately preceding March 25 and was approved for leave beginning March 27, that any unscheduled work days would also be covered.

Claimant had several warnings regarding his attendance prior to his March 25 absence. (Exhibits 6 through 8). The most recent warning was issued on November 30, 2016. At that time claimant had at least five absences due to personal issues and several others related to illness or injury. Claimant was warned further violations may lead to termination. Prior to that, claimant was issued another disciplinary action for his attendance on June 10, 2016. The employer's policies provide for termination if an employee receives three corrective actions of this nature within a rolling 12-month period. Claimant's absence on March 25 resulted in another corrective action, bringing him to three corrective actions within the last 12 months. A letter was written on March 28, 2017 informing claimant that his employment had been terminated. (Exhibit 4). However, the letter was not immediately sent and claimant was not notified that he had been terminated until April 11, 2017. The employer testified the delay was due to conversations with upper management and the legal department.

The claimant filed a new claim for unemployment insurance benefits with an effective date of May 7, 2017. The claimant filed for and received a total of $480.00 in unemployment insurance benefits for the week ending June 10, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on May 25, 2017. 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 Admin. Code r.871-24.32(8) provides:

> (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.

Claimant was discharged on April 11 for an absence occurring on March 25, 2017. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that

notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

Inasmuch as the employer knew about the issue on March 25, 2017, made the decision to terminate claimant on March 28, 2017, and did not confront or otherwise notify claimant his actions may result in disciplinary action, the delay of 17 days indicates the employer has not established a current or final act of misconduct. Furthermore, the employer failed to establish misconduct even were it current.

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:
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> 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.
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> 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.

Claimant did not report to work on March 25, 2017, because he was not aware he was required to work that day. This was not a regular work day for claimant and because he was absent from work due to his injury the week prior, he was never informed his team was working that day. Claimant cannot be expected to report to work outside his normal working hours when he was never told of this expectation by the employer. Furthermore, the employer had received sufficient information that claimant was still suffering was his injury and unable to work. Claimant was off work the entire regular work week prior to March 25 due to his injury and was approved for leave beginning March 27 because of his injury. The employer knew or should have known that if claimant was too injured to work on the dates before and after March 25, he would be too injured to work on March 25. Claimant's absence of March 25 was not volitional and therefore is considered excused.

Because his 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. The issues of overpayment and participation are moot.

DECISION:

The May 26, 2017, (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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs