

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

KELLY E HEARN
Claimant

CARE INITIATIVES
Employer

APPEAL 23A-UI-03809-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/12/23
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Care Initiatives, the employer/appellant,¹ filed an appeal from the Iowa Workforce Development (IWD) April 3, 2023 (reference 01) unemployment insurance (UI) decision. The decision allowed Ms. Hearn REGULAR (state) UI benefits because IWD concluded the employer dismissed her from work on March 10, 2023 for a reason that did not disqualify her from receiving UI benefits. The Iowa Department of Inspections and Appeals UI Appeals Bureau mailed notices of hearing to the employer and Ms. Hearn. The undersigned administrative law judge held a telephone hearing on May 3, 2023. The employer participated through Chelsea Dirksen, director of nursing and Ky Elliott, Equifax hearing representative. Ms. Hearn participated personally. The undersigned took official notice of the administrative record and admitted Employer's Exhibit 1 as evidence. Ms. Hearn submitted a statement via email after the hearing and after the record in this matter was closed. The undersigned did not consider this statement.

ISSUES:

Did the employer discharge Ms. Hearn from employment for disqualifying job-related misconduct?

Did IWD overpay Ms. Hearn UI benefits?

If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Hearn began working for the employer, a nursing home, on December 21, 2022. She worked as a full-time certified nursing assistant (CAN). Her employment ended on March 10, 2023.

On Friday, March 10, 2023 Ms. Hearn called in and said she could work her scheduled shift the next day, March 11, because she had tested positive for COVID-19 via an at-home test. Later in the day, Ms. Dirksen called Ms. Hearn and stated that Ms. Hearn needed to come to the employer's location to be tested in the parking lot, or she needed to provide test results from a medical provider. Ms. Hearn told Ms. Dirksen that she was waiting for a video call with her

¹ Appellant is the person or employer who filed the appeal.

doctor and that she could not drive to the employer's location to be tested at that time. While they were on the phone, Ms. Hearn's doctor called. They disconnected and Ms. Hearn spoke with her doctor. Ms. Hearn then called Ms. Dirksen back and offered to give the employer papers from her video call with her doctor. Ms. Dirksen refused to take the papers. Ms. Dirksen then told Ms. Hearn that the employer no longer needed her services because Ms. Hearn would not come to the employer's location to be tested or provide a test result from a medical provider. Ms. Hearn responded by cursing out Ms. Dirksen and hung up.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes the employer discharged Ms. Hearn from employment for a reason that does not disqualify her from receiving UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of such the employee's contract of employment. Misconduct is 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.

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

(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.** [Emphasis added.]

(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.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive.² The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings.³ Second, the absences must be unexcused.⁴ The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” or because it was not “properly reported.”⁵

An employer’s no-fault absenteeism policy or point system does not, on its own, decide the issue of qualification for UI benefits. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not voluntary. This is true 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.⁶ Medical documentation is not essential to a determination that an absence due to illness should be treated as excused.⁷ Absences related to other issues such as transportation, lack of childcare, and oversleeping are not considered excused.⁸ When a claimant does not provide an excuse for an absence the absences is deemed unexcused.⁹

The employer has the burden of proof in establishing disqualifying job misconduct.¹⁰ The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.¹¹ Misconduct must be “substantial” to warrant a denial of job insurance benefits.¹²

The decision in this case rests, at least in part, on the credibility of the witness. It is the duty of the undersigned as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue.¹³ The undersigned may believe all, part or none of any witness’s testimony.¹⁴ In assessing the credibility of witnesses, the undersigned should consider the evidence using his or her own observations, common sense and experience.¹⁵ 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.¹⁶ The undersigned assessed the credibility of the witnesses who testified during the hearing, considered the applicable factors listed above, and used his own common sense and experience in this matter. The findings of fact show how the undersigned has resolved the disputed factual issues in this case.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden

² Sallis v. Emp’t Appeal Bd., 437 N.W.2d 895 (Iowa 1989).

³ Higgins v. Iowa Dep’t of Job Serv., 350 N.W.2d 187, 192 (Iowa 1984).

⁴ Cospers v. Iowa Dep’t of Job Serv., 321 N.W.2d 6, 10 (Iowa 1982).

⁵ Higgins, 350 N.W.2d at 191; Cospers, 321 N.W.2d at 10.

⁶ Iowa Admin. Code r. 871-24.32(7); Cospers, 321 N.W.2d at 9; Gaborit v. Emp’t Appeal Bd., 734 N.W.2d 554 (Iowa Ct. App. 2007).

⁷ See Gaborit, 734 N.W.2d at 555-558.

⁸ Higgins, 350 N.W.2d at 191.

⁹ Id.; see also Spragg v. Becker-Underwood, Inc., 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

¹⁰ Cospers v. Iowa Dep’t of Job Serv., 321 N.W.2d 6 (Iowa 1982).

¹¹ Infante v. Iowa Dep’t of Job Serv., 364 N.W.2d 262 (Iowa Ct. App. 1984).

¹² Newman v. Iowa Dep’t of Job Serv., 351 N.W.2d 806 (Iowa Ct. App. 1984).

¹³ Arndt v. City of LeClaire, 728 N.W.2d 389, 394-395 (Iowa 2007).

¹⁴ State v. Holtz, 548 N.W.2d 162, 163 (Iowa App. 1996).

¹⁵ Id.

¹⁶ Id.

of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the employer terminated Ms. Hearn's employment because she did not provide the employer with a COVID-19 test result from a doctor or go to the employer's location to be tested after she called in sick. The evidence shows that Ms. Hearn properly reported her upcoming absence to the employer, told the employer the reason was illness, and offered to provide information from her video call with her doctor. The employer has failed to establish disqualifying, job-related misconduct on the part of Ms. Hearn. Benefits are allowed.

Since Ms. Hearn is eligible for REGULAR (state) UI benefits per this decision, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.¹⁷

DECISION:

The April 3, 2023 (reference 01) UI decision is AFFIRMED. The employer discharged Ms. Hearn from employment for a reason that does not disqualify her from receiving UI benefits. Benefits are allowed, as long as no other decision denies Ms. Hearn UI benefits.



Daniel Zeno
Administrative Law Judge

May 9, 2023
Decision Dated and Mailed

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¹⁷ *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrito** dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.