IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NICOLE M CARPENTER Claimant **IMMANUEL** Employer	**APPEAL 20A-UI-01076-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/05/20** **Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment
871 IAC 24.10 – Employer Participation in the Fact-Finding Interview

STATEMENT OF THE CASE:

Immanuel (employer) appealed a representative's January 27, 2020, decision (reference 01) that concluded Nicole Carpenter (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 21, 2020. The claimant did not provide a telephone number and, therefore, did not participate in the hearing. The employer was represented by Barbara Hamilton, Hearings Representative, and participated by Danielle Richardson, Human Resources Business Partner.

The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 10, 2019, as a full-time participant center aid. She signed for receipt of the employer's handbook on October 9, 2019. The attendance policy was included in the handbook. The employer did not issue the claimant any written warnings during her employment.

The attendance policy stated that ten attendance points in a twelve-month rolling period would indicate termination. Prior to termination, the employer would issue a verbal, written, and final written warning. Consecutive unscheduled absences counted as one (1) occurrence. The employer had the authority to "adapt or modify" the attendance policy. The attendance policy did not have a section on probationary employees. The employer believed it could modify the attendance policy for workers who had been employed for a shorter period of time. No established or drafted altered policy was provided to the claimant. The employer would not

accept doctor's notes from employees unless the employees were absent more than three days. The employer would not record the nature of the employees' absences.

The claimant properly reported her absences on October 24, 25, 30, November 6, and 7, 2019. The claimant accrued three points for the five absences because the consecutive absences counted as one point. She was tardy for work on October 22 and November 11, 2019, and accrued one point for the two incidents of tardiness. On November 28, 2019, the supervisor gave the claimant a forty-five-day review and talked to her about having five points (sic). The claimant was not warned of termination.

The claimant properly reported her absences on December 2, 30, and 31, 2019. On January 3, 2020, the claimant properly reported her absence due to illness to her supervisor. She gave her supervisor a doctor's note for her absence. On January 6, 2019, the employer terminated the claimant for having accrued seven attendance points. The employer modified its policy for the claimant without notice because she had excessive absences during her first few months of employment.

The claimant filed for unemployment insurance benefits with an effective date of January 5, 2020. The employer participated personally at the fact finding interview on January 24, 2020, by Danielle Richardson.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.
>
> 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(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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on January 3, 2020. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's January 27, 2020, decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/scn