

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**JENNIFER J TORGERSON**  
Claimant

**APPEAL 21A-UI-24405-DH-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**OC: 09/12/21  
Claimant: Respondent (1)**

---

Iowa Code § 96.5(1) - Voluntary Quit  
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/appellant, Harveys BR Management Co Inc, filed an appeal from the October 26, 2021, (reference 03) unemployment insurance decision that allowed benefits based upon finding the September 3, 2021 dismissal from work was for excessive absences were due to illness and were properly reported and therefore there was no misconduct. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for December 30, 2021. The claimant, Jennifer Torgerson, participated. The employer participated through Alyce Smolsky, party representative, and Mitchell Parker, human resources generalist. Employer's Exhibit of 9 pages was admitted. Judicial notice was taken of the administrative filed.

**ISSUE:**

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?  
Was the claimant overpaid benefits?  
Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

**FINDINGS OF FACT:**

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed full-time as a security officer, starting July 7, 2021. Her last day worked was August 27, 2021. Claimant was discharged from employment on September 3, 2021, when she called in on September 3, 2021 to miss work, resulting in her receiving more attendance points than the employer's policy allows.

Employer has an employee handbook that was given to claimant when she started employment. Claimant had absences and all the absences were properly called in, with all the absences being for personal illness except the July 9, 2021 and the September 3, 2021 matters. See Page 4 of Employer's Exhibit. The absences that are not due to personal illness are July 10, 2021 for no

electrical power and September 3, 2021, family emergency where claimant was taking a family member to get medical treatment. All the absences were properly reported within the employer's requirements. Even properly reported, points may be assigned.

Claimant received \$00.00 total in 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 Code section 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.

871 IAC 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.

Iowa Admin. Code r. 871-24.1(113)c provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). 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); 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 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. 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*. See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work.

The employer has established that claimant was warned further points could result in termination of employment and the final absence resulted in points, all of the absences were excused.

The personal illness absences, while resulting in points, are not disqualifying for unemployment misconduct purposes. The remaining two absences are not unexcused and two would not be considered excessive.

While the employer may have had good reason to terminate claimant, they did not have a disqualifying reason and no disqualification will be imposed. The remaining issues of overpayment of benefits, repayment of benefits and whether to charge employer's account are moot.

**DECISION:**

The October 26, 2021, (reference 03) unemployment insurance decision is **AFFIRMED**. Claimant was discharged for no disqualifying reason. The remaining issues of overpayment of benefits, repayment of benefits and whether to charge employer's account are moot.



---

Darrin T. Hamilton  
Administrative Law Judge

January 27, 2022  
Decision Dated and Mailed

dh/mh