IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CARLA A PAULSON Claimant **MATT & JOHNS GAMETIME LLC** Employer	**APPEAL 16A-UI-02701-DB** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/07/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation in Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the February 26, 2016, (reference 01) unemployment insurance decision that allowed claimant benefits. This matter was set for an in-person hearing on April 1, 2016. Due notice was issued and the parties were properly notified of the April 1, 2016 hearing. The claimant, Carla A. Paulson, participated personally in the April 1, 2016 hearing. The named employer for the April 1, 2016 hearing was John & Gary's Gametime Inc. During the April 1, 2016 hearing the successor employer, Matt & John's Gametime LLC, participated through Attorney Sam Charnetski and witness, Matt Pearson.

During the April 1, 2016 hearing, it came to the Administrative Law Judge's attention that Mr. Pearson and Attorney Charnetski were attending the hearing on behalf of Matt & John's Gametime LLC and not the named employer for the April 1, 2016 hearing, John & Gary's Gametime Inc. At that time it was determined that a continuance of the hearing was necessary so that an ownership issue regarding the employer could be determined by the Iowa Workforce Development Unemployment Insurance Services Tax Bureau. That investigation concluded that Matt and John's Gametime LLC was a successorship business. The predecessor business was John and Gary's Gametime Inc. The Tax Bureau investigation further established that Matt and John's Gametime LLC became the employer on February 2, 2016.

The hearing was re-scheduled as an in-person hearing in Des Moines, Iowa, on June 7, 2016 at 9:00 a.m. Due notice was issued for the hearing. The successorship business, Matt & John's Gametime, was listed on the hearing notice and it was mailed to this employer on May 24, 2016. The hearing notice was also mailed to the claimant and to the employer's attorney, Mr. Charnetski. The claimant, the employer and the employer's attorney failed to appear for the June 7, 2016 hearing. No postponement was requested by either party. The testimony received at the April 1, 2016 is made part of the record herein. Department's Exhibits 1 through 3 were admitted by the administrative law judge on June 7, 2016, at the time scheduled for this hearing. These exhibits are considered to be part of the record in this matter.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Is the claimant overpaid benefits?
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, including testimony taken during the April 1, 2016 hearing, the administrative law judge finds: Claimant was employed part-time as a bartender. Claimant was originally employed with the predecessor business, John and Gary's Gametime Inc. Matt & John's Gametime LLC became a successorship business and her employer effective February 2, 2016. See Exhibits D1, D2 and D3. Claimant was hired by Mr. Pearson to work for Matt & John's Gametime LLC.

Claimant was employed with Matt & John's Gametime LLC until February 9, 2016, when she was discharged. Her work hours varied but were generally between 6:00 p.m. to 2:00 a.m. She worked approximately 30 hours per week. Mr. Pearson was her supervisor.

The employer does not have a written policy regarding attendance. The verbal policy regarding attendance was that the employee must give the employer a decent notice prior to their scheduled shift start time if they were going to be absent.

Claimant contacted Mr. Pearson on February 1, 2016 to advise that she was ill with pneumonia and stated that she did not know if she would be able to come into work on her next scheduled shift. Claimant was scheduled to work next on February 5, 2016 at 6:00 p.m. Claimant reported to Mr. Pearson on February 5, 2016 that she would not be able to work. She reported her absence prior to her scheduled shift start time on February 5, 2016. Claimant was able to work on February 6, 2016.

Claimant was ill again on February 7, 2016. Claimant reported to Mr. Pearson on February 7, 2016 at 4:53 p.m. via text message that she would not be to work due to illness. She was scheduled to work at 6:00 p.m. on February 7, 2016.

Each of the claimant's absences was properly reported under the employer's verbal policy by contacting the employer at a decent time prior to the claimant's scheduled shift. Each of these absences was due to illness. Claimant had never received any verbal or written discipline regarding her absenteeism.

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 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:

> 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.
>
> 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(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. For example, 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); *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). 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*, 350 N.W.2d at 192. Second, the absences must be unexcused. *Cosper,* 321 N.W.2d 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*, 350 N.W.2d at 191. It can also be unexcused because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. *Higgins*, 350 N.W.2d at 190. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

The employer carries the burden of proof in a discharge from employment. 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 of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation.

Each of claimant's absences was due to properly reported illnesses and is therefore excused. As such, there is no current act of misconduct and benefits are allowed. Because benefits are allowed there is no overpayment.

DECISION:

The February 26, 2016, (reference 01) unemployment insurance decision allowing benefits is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dawn R. Boucher
Administrative Law Judge

_____
Decision Dated and Mailed

db/pjs