

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ARIES M KELLY**  
Claimant

**DALL-HAUS INC**  
Employer

**APPEAL 18A-UI-12279-CL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/25/18**  
**Claimant: Respondent (1)**

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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 Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 14, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 11, 2019. Claimant participated personally and through witnesses Jamie Kelly and Tanajah Landfair. Employer participated through general manager Austin Wyre. Employer's Exhibits 1 and 2 were received.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 began working for employer on August 29, 2018. Claimant last worked as a part-time team member. Claimant was separated from employment on October 25, 2018, when he was terminated.

Employer has an attendance policy stating employees are required to notify the manager on duty of tardiness as soon as possible. The policy warns the employee may be disciplined if they arrive more than five minutes after the scheduled start time and had not notified employer in advance. Claimant was aware of the policy.

Claimant's last day of work was October 17, 2018. Claimant came down with the stomach flu and was absent on October 22 and 23, 2018. Claimant gave a doctor's note to his friend

excusing him from work on October 22 and 23, 2018, due to the stomach flu. Employer received the note and considered the absences excused.

Claimant's next scheduled day of work was October 25, 2018. On the evening of October 24, 2018, claimant had a telephone conversation with general manager Austin Wyre. Claimant informed Wyre he was still not feeling better. Claimant believed this would be sufficient notice that he would not appear for his scheduled shift the next day. Claimant did not appear for his scheduled shift the next day, on October 25, 2018, and did not call a manager that morning to state he would be absent.

After the scheduled shift ended, claimant's friend/co-worker told claimant that Wyre was considering terminating claimant's employment. Claimant called Wyre who stated that claimant's employment was not working out due to his attendance issues and that maybe he could reapply at some point in the future. Claimant agreed.

### **REASONING AND CONCLUSIONS OF LAW:**

The first issue is whether claimant quit or was terminated. In this case, claimant's employment ended during a phone call with his manager Austin Wyre. Neither party asserts claimant ever said the words, "I quit." While claimant was agreeable when Wyre discharged his employment, it was not his idea. Claimant's separation is considered to be a discharge.

The next issue is whether claimant was discharged due to job-related misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

In this case, claimant's last absence was on October 25, 2018. Although employer's witness claims claimant actually worked on this date and was tardy, his testimony regarding claimant's last scheduled shifts and absences was conflicting. For instance, employer's witness testified claimant was scheduled on October 26, 2018, and had a no-call/no-show absence that day, but later testified that claimant was never scheduled to work on October 26, 2018. Therefore, I find claimant's timeline more credible and that October 25, 2018, was claimant's last absence from work prior to being separated from employment.

Claimant also testified that while he did not call in the morning of his last scheduled shift, he had a personal telephone conversation with general manager Austin Wyre the night before in which he explained he still was not feeling well. It was reasonable for claimant to believe he properly notified employer that he was not going to be at work the next day. Therefore, because the last absence was for reasonable grounds and was properly reported, it is considered excused under the law.

Because claimant's 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.

**DECISION:**

The December 14, 2018, (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.

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Christine A. Louis  
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Decision Dated and Mailed

cal/scn