

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRICIA J WOOD
Claimant

THE SAYER LAW GROUP PC
Employer

APPEAL 19A-UI-08579-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/29/19
Claimant: Respondent (1)**

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:

On October 31, 2019, The Sayer Law Group, P.C. (employer) filed an appeal from the October 21, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Tricia J. Wood (claimant) was discharged due to excessive absences that were due to illness and properly reported. The parties were properly notified about the hearing. A telephone hearing was held on December 10, 2019. The claimant participated personally. The employer participated through Stacey Belk, Compliance Manager, and was represented by Attorney Lori Nelson. The Employer's Exhibits 1 through 3 were admitted into the record without objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
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: The claimant was employed full-time as a Legal Assistant beginning in July 2018, and was separated from employment on October 1, 2019, when she was discharged. The employer provides its employees 80 hours of paid time off (PTO) each calendar year and any remaining at the end of the year can be rolled over to the first six months of the following year.

The claimant had numerous absences and exhausted her PTO by June 5, 2019. Tammy King, Team Lead, gave her a written warning to let her know she no longer had PTO and any absences for the rest of the year needed to be arranged with management in advance. The claimant continued to be absent and tardy due to illness and car issues. Most of the time, she would notify the employer before the start of her shift if she was going to be late or absent.

The claimant missed work on September 13 due to illness and reported her absence to the employer prior to the start of her shift. On September 16, Sean Belk, Production Manager, issued the claimant a third and final written warning. He told the claimant that any further absences that were not arranged beforehand would be grounds for discharge.

The claimant missed work on September 30 due to illness. She notified the employer prior to the start of her shift that she would not be at work. The claimant reported the following day and was told she was being discharged due to violations of the employer's attendance policy.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,826.00, since filing a claim with an effective date of September 29, 2019, for the eight weeks ending November 23, 2019. Stacey Belk, Compliance Manager, participated in the fact-finding interview on behalf of the employer.

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, provided the claimant is otherwise eligible.

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 provides, in relevant part:

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.

(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.

(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.

This definition of misconduct 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).

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 the 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) (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 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*.

The separation must also be based on a current act of misconduct to be disqualifying. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a “past act.” Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be

considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

In this case, the claimant's current act of misconduct, the absence on September 30, was excused as it was reported to the employer before the start of the shift and was due to illness. The employer contends in order for the claimant's absences to be properly reported, they needed to be arranged in advance; however, while that can be grounds to discharge an employee, it is not a reasonable requirement for determining eligibility for unemployment insurance benefits. Employees regularly become ill without the opportunity to arrange for the absence in advance. An employee's failure to arrange the absence in advance does not turn their inability to work due to illness into willful or deliberate misconduct. Because the final absence was excused, 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, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The October 21, 2019, 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. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.



Stephanie R. Callahan
Administrative Law Judge

December 12, 2019
Decision Dated and Mailed

src/scn