IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GATWECH G GATWECH Claimant **FIVE STAR QUALITY CARE INC** Employer	**APPEAL 17A-UI-02306-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/22/17** **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 Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 21, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 23, 2017. Claimant did not participate. Employer participated through human resources manager Gary Barrett. Executive director Tammy Bushong registered on behalf of the employer, but did not attend the hearing. Employer exhibit one was admitted into evidence with no objection. Official notice was taken of the administrative record of claimant's benefit payment history and the fact-finding documents, with no objection.

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 was employed full-time as a certified nursing aide (CNA) from April 15, 2015, and was separated from employment on January 22, 2017, when he was discharged.

The employer has a written no-call/no-show policy. Employer Exhibit One. The employer also has a written call-in policy. Employer Exhibit One. Employees are to call the on-call nurse, preferably two hours prior to the start of their shift, if they are going to be absent. Employer

Exhibit One. If the on-call nurse does not answer they are to call the facility. The employer has an attendance policy which applies occurrences to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employer Exhibit One. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving nine occurrences in a rolling twelve month period. Employer Exhibit One. Claimant was aware of the employer's policies. Employer Exhibit One.

The final incident occurred when claimant was a no-call/no-show from his scheduled shift on January 21, 2017. Claimant did not contact the on-call nurse to report his absence. The employer does not believe claimant contacted the facility. The employer did try to contact claimant on January 21, 2017, but was unsuccessful. On January 22, 2017, claimant reported to work and clocked-in at noon, even though he was scheduled to work at 2:00 p.m. After claimant clocked-in, the charge nurse approached claimant and sent him home because he was discharged for not showing up on January 21, 2017. On January 23, 2017, Mr. Barrett spoke to claimant on the phone. Mr. Barrett requested claimant to come in and discuss the no-call/no-show so the employer could hear from claimant why he was a no-call/no-show. Claimant met with Mr. Barrett on January 24, 2017. Claimant told Mr. Barrett that he had a lot of personal issues that he was dealing with. Claimant stated that he had picked up hours for the employer in the past and he would make it up to the employer. Claimant also told Mr. Barrett that the assistant director of nursing gave him the day off. Mr. Barrett checked with the assistant director of nursing and she denied giving claimant the day off on January 21, 2017. Mr. Barrett then confirmed that claimant was discharged.

On February 10, 2016, the employer gave claimant a written warning for being a no-call/no-show on February 7, 2016. Mr. Barrett changed the warning from a final written warning to a written warning because of some confusion. Claimant had no other warnings for absenteeism or no-call/no-shows.

After February 10, 2016, claimant was absent or tardy on: July 4, 2016 (absent); July 5, 2016 (absent); September 12, 2016 (absent); October 9, 2016 (tardy); October 30, 2016 (absent); November 4, 2016 (absent for a cousin's funeral); November 21, 2016 (absent because he was too far away to make it to work on time); December 11, 2016 (tardy (38 minutes late)), and January 21, 2017 (no-call/no-show). Claimant did not receive any warnings for these absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Admin. Code r. 871-24.25(4) provides:

> **Voluntary quit without good cause.** In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

> **(4)** The claimant was absent for three days without giving notice to employer in violation of company rule.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Since the employer does not have a policy as set out in Iowa Admin. Code r. 871-24.25(4) and claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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.

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 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). 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 therefore 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* 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. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

Although an employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged claimant contrary to the terms of its own policy, which does not call for termination until after nine occurrences are accumulated and three warnings (document counseling, written warning, and final written warning) are provided. Employer Exhibit One. The only warning claimant received was a written warning on February 10, 2016. After this warning, claimant was absent seven more times (including the final incident on January 21, 2017) and tardy twice. Despite having over six more occurrences, the employer failed to provide claimant with any warnings regarding his absenteeism even though its policy called for him to receive warnings. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Furthermore, claimant was discharged without reaching nine occurrences and since the consequence of discharge was more severe than other employees would receive for similar conduct by the terms of the policy, the disparate application of the policy cannot support a disqualification from benefits. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The February 21, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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