IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LINDSEY M DEE Claimant **NPC INTERNATIONAL INC** Employer	**APPEAL 17A-UI-00829-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/11/16** **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:

The employer filed an appeal from the January 13, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were notified about the hearing. Both parties agreed to waive timely notice of the hearing and hold the hearing at 9:00 a.m. instead of 1:00 p.m. on February 14, 2016. A telephone hearing was held on February 14, 2017. Claimant participated. Employer participated through unemployment insurance consultant Bonita Pevey and restaurant general manager Rachel Perry. Official notice was taken of administrative record of claimant's wage and benefit payment history, with no 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: Claimant was employed part-time as a cook from October 26, 2016, and was separated from employment on December 10, 2016, when she was discharged.

The employer has a written attendance policy. Employees are required to contact the employer at least two hours prior to their shift if they are going to absent or late. The employer also has a progressive disciplinary policy that provides for two written warnings prior to termination. Claimant was aware of the policies.

Ms. Perry testified the final incident occurred when claimant was tardy on December 1, 2016 to her shift. The employer gave claimant a verbal warning. On November 30, 2016, claimant's

garage burnt down and she had to leave work early and later she went to Nebraska for the night. On December 1, 2016, claimant was driving from Nebraska to work when she received a message that her grandfather had passed away. Claimant contacted the employer and spoke to Ms. Perry. Claimant told Ms. Perry that she just found out her grandfather passed away, she could not take it anymore, and she requested some sort of paid time off. Ms. Perry stated she would request it for claimant and let her know. Ms. Perry later sent claimant a text message that the leave had been approved. The employer told claimant she was allowed three days off. Claimant returned from Nebraska around December 6, 2016. Claimant then worked two days for the employer; the last day that she worked was December 9, 2016.

On December 10, 2016, claimant sent Ms. Perry a text message asking what time she worked. Ms. Perry responded that claimant did not work and Ms. Perry had to let her go. Claimant had been scheduled to work on December 10, 2016.

Claimant was given a verbal warning for being tardy on November 25, 2016. Claimant was warned that her job was in jeopardy. Ms. Perry testified claimant was given multiple verbal warnings regarding her attendance. The employer did not give claimant any written warnings.

Ms. Perry testified that during claimant's employment, she was tardy on November 4, 5, 10, 11, 12, 25, 26, and 30, 2016. Ms. Perry also testified claimant was tardy on December 1, 2016 and absent from work on November 19, 2016.

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.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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(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.*

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Although claimant had multiple tardies during her employment, the employer discharged claimant contrary to the terms of its own policy, which does not call for termination until after two written warnings are issued. The employer never gave claimant any written warnings. Although the employer had issued multiple verbal warnings, claimant continued to be late for work and 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. Thus, 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.

Furthermore, claimant's final absence was due to a properly reported reasonable ground (her grandfather had just passed away). On December 1, 2016, claimant communicated with the employer the reason for her absence as soon as she found out. Claimant also requested approved leave and the employer granted her time off of work. Because claimant's last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred that establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

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

DECISION:

The January 13, 2017, (reference 02) 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

jp/rvs