

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CYNTHIA ALTEMUS
Claimant

AYERCO
Employer

APPEAL 20A-UI-15069-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/03/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 10, 2020, (reference 01) unemployment insurance decision that concluded she was eligible for benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 21, 2021. The claimant participated. The employer participated through Office Manager Tammy DeJaynes. The administrative law judge took judicial notice of the administrative records.

ISSUE:

1. Was the claimant discharged for disqualifying job-related misconduct?
2. Whether the claimant was overpaid regular unemployment benefits?
3. Whether the claimant was overpaid Federal Pandemic Unemployment Compensation (FPUC)?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed part-time as a cashier from June 26, 2020, until her employment ended on July 19, 2020, when she was terminated. Her immediate supervisor was Store Manager Michelle Clayton. The claimant's schedule varied according to customer demands.

The employer had an attendance policy in its employee manual that stated one no call / no show could result in immediate termination. More recently, the employer had relaxed that policy to allow for one or two no call / no shows given exigent circumstances. The employer expected employees to notify their supervisor at least a few hours before a scheduled shift. The claimant acknowledged the policy on the first day she worked for the employer.

On July 3, 2020, the claimant's boyfriend called the employer and informed them that she would not be coming to work. Ms. DeJaynes was not aware if the claimant's boyfriend provided a reason.

On July 4, 2020, the claimant did not arrive for her assigned shift and did not call in prior to get it excused. Ms. DeJaynes was not aware if Ms. Clayton called the claimant on that day.

On July 5, 2020, the claimant did not arrive for her assigned shift and did not call in prior to get it excused. Ms. DeJaynes was not aware if Ms. Clayton called the claimant on that day.

On July 13, 2020, Ms. Clayton orally warned the claimant that her previous no call / no shows warranted immediate termination and any additional incidents would likely result in her termination.

The last day the claimant worked was on July 17, 2020.

On July 18, 2020, the claimant did not arrive for her assigned shift and did not call in prior to get it excused. Ms. DeJaynes was not aware if Ms. Clayton called the claimant on that day.

On July 19 2020, the claimant did not arrive for her assigned shift and did not call in prior to get it excused. Ms. DeJaynes was not aware if Ms. Clayton called the claimant on that day. Ms. Clayton terminated the claimant on July 19, 2020, for excessive absenteeism. Ms. Clayton did not testify at the hearing because she is no longer with the company.

On July 20, 2020, the claimant asked Ms. Clayton over the employer's Facebook page if she had been terminated.

The administrative record shows the claimant did not receive unemployment insurance benefits or FPUC benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for willful misconduct. The administrative law judge concludes the issues of overpayment of regular and FPUC benefits are moot because the claimant did not receive either type of benefit.

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(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.

Excessive absences are not considered misconduct unless unexcused. 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); *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. 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.

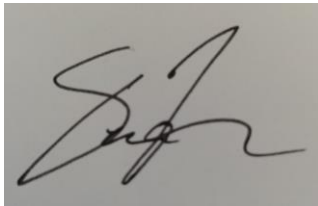
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an

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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The claimant had five unexcused absences in the several weeks she worked for the employer. This is excessive and constitutes willful misconduct. Benefits are denied. As described in the findings of fact, the claimant did not receive unemployment insurance or FPUC benefits, so the issue of overpayment is moot.

DECISION:

The November 10, 2020, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

February 12, 2021
Decision Dated and Mailed

smn/mh