**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **JESSICA A BROWN**<br>Claimant<br><br>**J & D RESTAURANTS 2 INC**<br>Employer | **APPEAL 18A-UI-09513-NM**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 08/19/18**<br>**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 September 10, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A hearing was held in person in Creston, Iowa on October 10, 2018. Claimant participated and testified. Employer participated through General Manager Emma Sells. Employer's Exhibits 1 through 15 were received into evidence.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

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

Can any 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 20, 1999. Claimant last worked as a full-time crew member. Claimant was separated from employment on June 6, 2018, when she was discharged.

On Saturday, June 2, 2018, Sells met with claimant to discuss changing her schedule so that she would no longer work weekends, but would instead work Monday through Friday. Claimant agreed to the change. Sells told claimant the changes would take place effective immediately and then made the changes on the paper copies of the schedule. Claimant misunderstood this portion of the conversation and believed the changes would take place the following week, as the schedule for the week of June 3 had already been posted.

Around this same time the City of Creston, where the employer business, a fast-food restaurant, is located, was under a boil advisory. Due to the boil advisory the restaurant could not make or serve food. Claimant was left a voicemail later in the day on June 2 that she should come in and clean on June 3, 2018. Claimant did not receive the voicemail, as her phone had been turned off, and therefore did not come in to work. The employer's attendance policy provides for immediate discharge after two no-call/no-shows within a 90 day period. Claimant came in the following day, June 4, as originally scheduled. No one mentioned missing work on June 3 to her. Claimant was not originally supposed to work June 5 or June 6, but was listed under the revised version of the schedule. Claimant, having misunderstood that the schedule was being revised for the week in question, did not show up to either shift. Calls to claimant were unanswered, as her phone was still off. When claimant's phone was turned back on the evening of June 6, she heard the voicemails from the employer about her missed shifts and immediately called to speak to a supervisor. Claimant was notified she had been discharged from employment for having too many no-call/no-shows under the employer's attendance policy.

The claimant filed a new claim for unemployment insurance benefits with an effective date of September 10, 2018. The claimant filed for and received a total of $1,450.00 in unemployment insurance benefits for the weeks between September 2 and October 6, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on September 7, 2018. The fact finder determined claimant qualified for benefits.

**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.

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.

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). 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.

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

Claimant was discharged after she was a no-call/no-show on June 3, June 5, and June 6, 2018. Claimant had no prior attendance issues and testified she did not come to work because she misunderstood when a planned schedule change was going to take effect. This claim is supported by the fact that claimant did come in to work on June 4, 2018, as scheduled prior to the changes being made. Claimant had no prior disciplinary action related to her attendance. 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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has

not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

**DECISION:**

The September 10, 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. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs