

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DANIELLE E HARRISON**  
Claimant

**PRIMARY HEALTH CARE INC**  
Employer

**APPEAL 22A-UI-00419-AR-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/07/21**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer, Primary Health Care, Inc., filed an appeal from the December 1, 2021, (reference 01) unemployment insurance decision that allowed benefits based upon the determination that claimant was discharged for absenteeism due to illness. The parties were properly notified of the hearing. A telephone hearing was held on January 26, 2022. The claimant, Danielle E. Harrison, participated personally. The employer participated through Lisa Thang. Employer's Exhibits 1 through 8 were admitted. The administrative law judge took official notice of the administrative record.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a family planning coordinator from March 25, 2019, until this employment ended on September 27, 2021, when she was discharged.

Beginning in early August 2021, claimant was dealing with health issues. She and the employer discussed whether FMLA was an option. Claimant was given the paperwork for her doctor to complete to apply for FMLA. That paperwork was not returned.

Claimant returned to work for a period, but then, on August 24, 2021, claimant did not report for work. Her supervisor, Tracy Menter, reached out to claimant's emergency contact, who said claimant had been hospitalized. The employer designated her time off as FMLA in a provisional manner but reiterated that it needed her medical provider to complete the paperwork.

Claimant maintained some contact with Menter, discussing her leave and her efforts to get the FMLA paperwork completed. On September 9, 2021, claimant reported that she was not released to work until September 13, 2021. Claimant did not report for work on September 13, 2021, nor did she call in as absent. Menter called her on September 14, 2021, but received no reply. On September 15, 2021, Thang sent out a letter notifying claimant that the employer

needed her FMLA certification back by September 23, 2021, or it would consider all of her absences to be subject to its attendance policy. The employer's attendance policy dictates that six unscheduled absences in a 12-month period will result in termination.

The employer got no response from claimant regarding the September 15, 2021, letter. On September 27, 2021, Thang sent claimant a letter notifying her that she had been separated from employment—a separation the employer considered a voluntary resignation. By that time, claimant's unscheduled absences numbered 25 because the FMLA paperwork had not been returned. Claimant received the September 15, 2021, and the September 27, 2021, letters when she returned from another period of hospitalization, after her employment had already ended. Claimant did not know whether any of her family members reached out to the employer during her illness.

The administrative record reflects that claimant filed for and received payment of unemployment insurance benefits in the gross amount of \$4,572.00, after filing her claim for benefits with an effective date of November 7, 2021. The employer did not receive a notice of fact-finding interview to be conducted. When the employer received the decision allowing benefits, Thang called Iowa Workforce Development to inquire about the fact finding. She was told there had been a cold call. The administrative record does not reflect that a fact finding occurred in this matter.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

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 v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982); *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*, 734 N.W.2d 554. 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*, 350 N.W.2d at 192. Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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,” or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Higgins*, 350 N.W.2d at 191; *Cosper*, 321 N.W.2d at 10.

There is little doubt that claimant's absences here were due to illness. However, specifically those absences on and after September 13, 2021, are considered unexcused, because the employer received no contact from claimant regarding her status, when she expected to return to work, or even to submit completed FMLA paperwork. There is no evidence suggesting that, even after a call from the employer to the emergency contact, any of claimant's family members updated the employer, either. Claimant was aware of the employer's policy regarding attendance, and she had been working with the employer regarding FMLA for a period, so she was also aware of the employer's policy with respect to FMLA. Though claimant's absences were related to illness, they were improperly reported, and unexcused. They were also excessive. Accordingly, the employer has established that the claimant was discharged for job-related misconduct. Unemployment insurance benefits are denied effective November 7, 2021.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871—24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871—24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The administrative record does not reflect that a fact-finding interview occurred. The employer was not given an opportunity to participate in the fact finding.

Claimant filed a claim for benefits each week from November 7, 2021, through the week that ended January 22, 2022. She received a total benefit amount of \$4,572.00 for that period.

Because the employer did not participate in the fact-finding interview within the meaning of Iowa Admin. Code r. 871—24.10, and the overpayment occurred because of a subsequent reversal on appeal, benefits shall not be recovered from the claimant. However, the employer shall not be charged for benefits paid, as the failure to participate was due to no fault of its own. The overpayment shall instead be absorbed by the fund.

**DECISION:**

The December 1, 2021, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to excessive, unexcused absenteeism. 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.

Claimant has been overpaid unemployment insurance benefits. However, the overpayment shall not be recovered from the claimant and the employer shall not be charged. The overpayment in the amount of \$4,572.00 is charged to the fund.



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Alexis D. Rowe  
Administrative Law Judge

February 17, 2022  
Decision Dated and Mailed

ar/kmj