

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TYREANA S BROWN
Claimant

SIMPLY ESSENTIALS LLC
Employer

APPEAL 17A-UI-05304-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/23/17
Claimant: Respondent (1)

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) – 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 May 10, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 12, 2017. The claimant participated personally. The claimant's representative/attorney was unavailable when called. The employer participated through Clint Richmond, human resources and safety manager. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the payments received by the claimant (DBRO) but administrative records including the fact-finding documents were unavailable at the time of the hearing. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a production worker and was separated from employment on April 19, 2017, when she was discharged for excessive absenteeism.

The employer utilizes a point system that tracks attendance infractions with corresponding point values. Upon reaching seven points in a twelve month period, an employee is subject to discharge (Employer Exhibit 1). The claimant received the policy upon hire, and received one documented warning on March 9, 2017 in response to accruing 4 attendance points (Employer Exhibit 1). According to the employer's policy, a doctor's note will not excuse an absence (or

attendance point) but may reduce the points when there are consecutive absences related to a single illness or injury and supported by a doctor's note (Employer Exhibit 1). The claimant did not furnish doctors' notes for any of the considered absences. The claimant was not issued attendance points on occasion when she was sent home early due to slow production.

The claimant accumulated the following attendance points while employed:

February 20, 2017	Late due to car issues	½ point
February 27, 2017	Left early for unknown reasons (more than 4 hours early)	1 point
March 6, 2017	Left early for unknown reasons	½ point
March 7, 2017	Absent, properly reported, due to illness	1 point
March 9, 2017	Absent, properly reported, due to illness	1 point
March 27, 2017	Left early due to death in family	½ point
March 29, 2017	Absent, properly reported, for family reasons	1 point
April 18, 2017	Absent, properly reported, due to dental issues	1 point
April 19, 2017	Absent, properly reported, due to dental issues	1 point

The evidence is disputed as to whether the claimant furnished a note from her dentist reflecting she was excused from work or visited the dentist on April 18 and 19, 2017. The employer referenced receiving a note dated April 20, 2017 which did not reference the claimant being excused the prior days. By April 20, 2017, the claimant had "pointed out" so the note was not taken into consideration. According to the claimant, her final two absences, which were properly reported by calling the attendance line in advance, were due to a toothache, and subsequent tooth pull. The claimant delayed immediate care because she had to visit with Mr. Richmond about her insurance after her dentist initially rejected it. She was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$907.00, since filing a claim with an effective date of April 23, 2017. The administrative record also establishes that the employer did participate in the May 9, 2017 fact-finding interview by way of Clint Richmond.

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.

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the

evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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."

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); *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Therefore any absence properly reported and attributed to illness cannot be considered towards a finding of misconduct. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

In this case, the claimant had repeated absences on February 20, 27, March 6, 7, 9, 27, 29, and April 18 and 19, 2017. The employer did not allege any of the absences were not properly reported per its policy. The administrative law judge recognizes that the claimant's absences for family reasons and transportation would be unexcused, regardless of whether properly reported.

However, the undisputed evidence is the claimant properly reported her final two absences on April 18 and 19, 2017, which were attributable to dental pain and having a tooth pulled. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Cognizant that a reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act, and that a medical note is not required to determine whether the absence should be excused, the administrative law judge concludes the claimant's final two absences on April 18 and 19, 2017, would be excused for purposes of unemployment insurance eligibility.

Based on the evidence presented, the administrative law judge concludes that the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which 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.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and employer relief of charges are moot.

DECISION:

The May 10, 2017, (reference 01) decision is affirmed. The claimant was discharged but for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer is not relieved of charges associated with this claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn