

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**KELSEY KLINGENBERG**

Claimant

**APPEAL 17A-UI-12631-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GRAPETREE MEDICAL STAFFING INC**

Employer

**OC: 11/12/17**

**Claimant: Respondent (1)**

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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 November 29, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 4, 2018. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Jeanenne Kinnetz, vice president of human resources. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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 part-time as a CNA and was separated from employment on November 13, 2017, when she was discharged for excessive absenteeism.

The employer provides staff to medical facilities via contract. The medical facilities contract with the employer to ensure they are meeting mandated patient to staff ratios. As such, it relies upon its employees to give notice if they are unable to fill a job assignment. The employer requires 12 hours' notice and has a "self-cancellation" policy which charges an employee \$50.00 if they do not show or "self-cancel" a confirmed assignment. The claimant was made aware of the employer's policies and expectations at the time of hire.

The undisputed evidence is the claimant received three warnings prior to discharge for attendance matters, including written warnings on May 9, 2017 and September 13, 2017, and a final verbal warning on November 3, 2017. The claimant had the following absences that were considered for her discharge: (Employer Exhibit 1)

11/9/16	Absence due to illness
01/11/17	Absence due to mother's hospitalization
01/23/17	Absence due to emergency dental issue
02/11/17	Absence due to dental issue
02/22/17	Absence due to mother's hospitalization
03/25/17	Absence due to personal illness
04/23/17	Absence due to pregnancy complications
05/08/17	Absence due to fever
05/18/17	Absence due to miscarriage
09/08/17	Absence due to flu
09/13/17	Absence due to illness
10/31/17	Absence due to illness
11/12/17	Absence due to illness
09/29/16	Tardy due to schedule misread
02/18/17	Tardy due to flat tire
10/29/17	Tardy due to unknown reasons
11/02/17	Tardy due to unknown reasons
11/03/17	Tardy to unknown reasons
11/11/17	Tardy due to flat tire, called and notified employer

The final incident occurred on November 11, 2017, when the claimant called the employer at 7:43 a.m. in advance of her 9:00 start time to report she would be late due to a flat tire. The claimant would have been discharged based upon November 11, 2017, according to the employer. However, the claimant then called off sick at 5:00 a.m. on November 12, 2017 in advance of her November 12, 2017 shift, which started at 9:00 a.m. The employer stated its policy requires 12 hours' notice so neither call off was with proper notification. She was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$300.00, since filing a claim with an effective date of November 12, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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 of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp’t Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). 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).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)(“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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

The undisputed evidence is the claimant had approximately 19 absences or tardies within a one year period (Employer Exhibit 1). The administrative law judge recognizes the strain the claimant’s attendance history had on the employer. The undisputed evidence is the claimant had been repeatedly warned that her job was in jeopardy prior to discharge based upon her pattern of attendance. Whether the employer considers the claimant’s November 11, 2017 tardy to November 12 absence the final incident, the final act was not for misconduct.

An employer’s absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury or other reasonable grounds is excused for the purpose of the Iowa Employment Security Act. In this case, the claimant made the employer aware on November 11, 2017 at 7:43 a.m. that she had a flat tire and would be late to her 9:00 a.m. shift. Regardless of the employer’s 12 hour notice policy for absences, the claimant could not have reasonably calculated she had a flat tire 12 hours in advance to alert the employer of her tardy. Therefore, the administrative law judge is persuaded that the claimant did notify the employer by reporting her tardy in advance of her start shift, and based on the reason (flat tire), it would be excused for purpose of determining unemployment insurance eligibility.

Alternatively, if the employer considered the November 12, 2017 absence to be the final incident, the claimant would remain eligible for benefits because she gave the employer over

three hours' notice in advance that she was sick, before being absent. Based on the evidence presented, the administrative law judge concludes 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 relief of charges are moot.

**DECISION:**

The November 29, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld shall be paid, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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