

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SEBASTIAN L PRITT**  
Claimant

**KARDES INC**  
Employer

**APPEAL 24A-UI-03324-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/03/24  
Claimant: Respondent (1)**

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Iowa Code § 96.5(2)(a) - Discharge for Misconduct  
Iowa Code § 96.3(7) - Overpayment of Benefits  
Iowa Admin. Code r. 871-24.10 - Employer Participation in Fact Finding Interview

**STATEMENT OF THE CASE:**

The appellant/employer filed an appeal from the March 22, 2024 (reference 01) unemployment insurance decision that concluded the claimant was eligible for unemployment insurance benefits following a separation from employment. A notice of hearing was mailed to the parties last known address of record for a telephone hearing scheduled for April 18, 2024. The appellant did not participate. The employer participated through witnesses Michael Cox and Matt Digmann. The administrative law judge took official notice of the claimant's administrative records.

**ISSUES:**

Is the separation from employment disqualifying?  
Is the claimant overpaid benefits?  
Is the employer's account subject to charges?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for this employer on September 12, 2023 as a kitchen cook. He was working part-time hours at the time of his separation from employment.

On March 4, 2024, the claimant was notified via text message that he was discharged from employment by Mr. Digmann. The final incident leading to the claimant's discharge from employment occurred when the claimant called off sick for his March 1, 2024 scheduled shift.

Part of the claimant's job duties included mopping the floors, preparing food, and other cleaning tasks. The employer had a checklist of tasks for the claimant to follow and complete each day.

Prior to the discharge, the claimant had received a notification on December 12, 2023 that was an extension of claimant's probationary status with the employer. This was due to the claimant's absenteeism and failure to complete job tasks.

The employer alleged that the claimant failed to complete tasks every single day leading up to the December 12, 2023 discipline and every single day between December 12, 2023 and March 4, 2024; however, no other discipline was given to claimant between December 12, 2023 and his discharge.

Between December 12, 2023 and March 4, 2024, claimant had approximately 5 incidents of absenteeism from work. The employer did not have specific dates.

All absences were reported to the employer and were either for personal illness or a family member being in the hospital. The employer has a written absenteeism policy; however, the policy does not define how many absences are considered excessive as it is left to the employer's discretion on what it considers to be excessive.

Claimant's administrative records establish that he has not filed any weekly continued claims and has not been paid any unemployment insurance benefits to date. Mr Cox and Mr. Digmann both participated personally in the fact finding interview.

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

For the reasons that follow, the administrative law judge concludes as follows:

The issue in this case is whether the separation from employment on March 4, 2024 was disqualifying. I find that it was not disqualifying and benefits are allowed, provided the claimant remains otherwise eligible.

Iowa Code section 96.5(2)a & d provide in pertinent part:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of the 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 obligation to the employer. Misconduct by an individual includes but is not limited to all of the following: ...

(9) Excessive unexcused tardiness or absenteeism. ...

The employer has the burden of proof in establishing disqualifying job-related misconduct.<sup>1</sup> In unemployment insurance benefits cases, the issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits.<sup>2</sup> What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions.<sup>3</sup>

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.<sup>4</sup> Such misconduct must be “substantial.”<sup>5</sup> The discharge must also be based upon a current act of misconduct.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 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.<sup>6</sup> The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive.<sup>7</sup> The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.<sup>8</sup>

Second, the absences must be unexcused.<sup>9</sup> The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds”.<sup>10</sup> Or, because it was not “properly reported.”<sup>11</sup>

Excused absences are those “with appropriate notice.”<sup>12</sup> The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an

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<sup>1</sup> *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

<sup>2</sup> *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

<sup>3</sup> *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

<sup>4</sup> *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

<sup>5</sup> *Id.*

<sup>6</sup> 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.”

<sup>7</sup> *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).

<sup>8</sup> *Higgins*, 350 N.W.2d at 192 (Iowa 1984).

<sup>9</sup> *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

<sup>10</sup> *Higgins*, 350 N.W.2d at 191 (Iowa 1984).

<sup>11</sup> *Id.* and *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

<sup>12</sup> *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

extended tardiness, and an incident of tardiness is a limited absence.<sup>13</sup> Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused.<sup>14</sup>

Absences due to illness or injury must be properly reported in order to be excused.<sup>15</sup> Absences in good faith, for good cause, with appropriate notice, are not misconduct.<sup>16</sup> They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct.<sup>17</sup>

Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned.<sup>18</sup>

In this case, the final incident leading to the claimant's discharge from employment occurred when he called off of work on March 1, 2024. His absence that date was properly reported to the employer and was due to personal illness. Therefore, with regard to unemployment insurance benefits laws, it was considered excused.

The employer also alleged that the claimant's actions in failing to complete job tasks was another reason for the dismissal. The employer alleged that the claimant failed to complete job duties every single day that he worked; however, no further discipline or discharge was administered until the claimant called off from his shift on March 1, 2024. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional.<sup>19</sup>

Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant.<sup>20</sup> Since the employer stated that the claimant had never sustained a period of time during which he performed all of his job duties to the employer's satisfaction, no intentional misconduct has been established.<sup>21</sup>

The discharge from employment is not disqualifying and benefits are allowed, provided the claimant remains otherwise eligible. The issue of overpayment is moot. The employer's account may be charged for any benefits paid.

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<sup>13</sup> *Higgins*, 350 N.W.2d at 190 (Iowa 1984).

<sup>14</sup> *Id.* at 191.

<sup>15</sup> *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982).

<sup>16</sup> *Id.* at 10.

<sup>17</sup> *Id.*

<sup>18</sup> See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

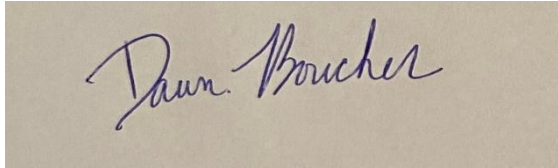
<sup>19</sup> *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

<sup>20</sup> *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

<sup>21</sup> *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

**DECISION:**

The March 22, 2024 (reference 01) unemployment insurance decision is affirmed as the separation from employment with this employer on March 4, 2024 is not disqualifying. Benefits are allowed, provided the claimant is otherwise eligible. The employer's account may be charged for benefits paid if any weekly claims are filed.

A rectangular area containing a handwritten signature in blue ink that reads "Dawn Boucher". The signature is written in a cursive style on a light-colored, textured background.

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Dawn Boucher  
Administrative Law Judge

April 19, 2024  
Decision Dated and Mailed

db/scn

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board**  
**6200 Park Avenue Suite 100**  
**Des Moines, IA 50321**  
**Fax: (515)281-7191**  
**Online: [eab.iowa.gov](http://eab.iowa.gov)**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board**  
**6200 Park Avenue Suite 100**  
**Des Moines, IA 50321**  
**Fax: (515)281-7191**  
**Online: [eab.iowa.gov](http://eab.iowa.gov)**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.