

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KASSIDY A PIERSON
Claimant

SAFELITE SOLUTIONS LLC
Employer

APPEAL 22A-UI-01407-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/28/21
Claimant: Respondent (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

On December 17, 2021, the employer/appellant filed an appeal from the December 7, 2021, (reference 02) unemployment insurance decision that allowed benefits based on claimant being discharged on November 22, 2021 for excessive absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on February 7, 2022. Claimant did not call in to participate. Employer participated through hearing representative, Erin Bewley. Director of Operations, Annette Kohl, was called as a witness. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 were admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits.

ISSUES:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Should claimant repay benefits?

Should the employer be charged due to employer participation in fact finding?

Is the claimant overpaid benefits?

Is the claimant eligible for FPUC?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 26, 2018. Claimant last worked as a full-time customer service representative. Claimant was separated from employment on November 22, 2021, when she was discharged for absenteeism.

The employer has an attendance policy that when an employee accumulates six absences they get a verbal warning, on the seventh absence they get a written warning, on the eighth absence they get a final written warning, and on the ninth absence they are terminated. The employer

requires its employees to call into their automated call in system at least one hour in advance of the employee's shift. Claimant was aware of the policy and acknowledged receipt of the policy on November 26, 2018. (Exhibit 1).

Claimant had received four prior final written warnings about her attendance from April 23, 2021, through September 23, 2021. (Exhibits 2-6). Claimant's last final written warning on her attendance was on September 24, 2021. In the warning claimant was warned: "Should the associate have any infractions related to the Attendance Policy, it will result in further corrective action, up to and including immediate termination." (Exhibit 3).

After claimant received her final warning she was a no call, no show on October 29, 2021, and November 2, 2021. Claimant was also absent November 9, 2021 and November 12, 2021. Claimant appropriately called into the employer prior to her shift but she did not specify why she was absent. Claimant was absent from work on November 15, 2021. Claimant called in to work at least an hour in advance of her scheduled shift. Claimant did not specify why she was absent. Claimant had fifteen absences from June 15, 2021 until November 15, 2021. (Exhibit 2). The employer discharged claimant on November 22, 2021, due to claimant's excessive absenteeism.

Claimant filed for benefits with an effective date of March 28, 2021. Claimant filed an additional claim on November 21, 2021. Claimant's weekly benefit amount is \$295.00. Claimant began filing a weekly claim on week ending November 27, 2021 and continued filing for benefits each week thereafter. Claimant has received ten weeks of benefits. Claimant has received a total of \$2,950.00 in benefits.

The claimant did not received Federal Pandemic Unemployment Compensation (FPUC) benefits after week ending September 5, 2021.

The employer participated in a telephone fact-finding interview. The employer did not submit documents to support their position for the fact-finding interview.

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. Benefits are denied.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” *Higgins*, 350 N.W.2d at 191 or because it was not “properly reported.” *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. 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. *Id.*

Excessive absenteeism has been found when there has 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. 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).

In this case, the claimant had received a final written warning for her absenteeism and was notified that another absence would lead to her termination. Claimant had five more absences before the employer decided to terminate her for her absence on November 15, 2021. Claimant was not present to testify why she was absent. As a result, the employer has met its burden of proof establishing that claimant has excessive unexcused absences. The final absence, in combination with the claimant’s history of unexcused absenteeism amount to job-related misconduct. Benefits are denied effective November 21, 2021.

Since claimant is not eligible for state unemployment benefits effective November 21, 2021, it must be determined if claimant was overpaid benefits she was not entitled to receive. The administrative law judge finds claimant has been overpaid regular state unemployment benefits in the amount of \$2,950.00 for ten weeks ending January 29, 2022. Claimant is required to repay the regular state unemployment benefits because the employer did participate in the fact-finding interview.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides, in pertinent part: :

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.

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 un rebutted 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.

Claimant has been overpaid state unemployment benefits in the amount of \$2,950.00, for the weeks between November 27, 2021 and January 29, 2022. The employer participated in the fact-finding interview. As a result, the employer's account shall not be charged. The claimant is required to repay the benefit.

The claimant did not received FPUC benefits after November 21, 2021. The claimant has not been overpaid FPUC benefits.

DECISION:

The December 7, 2021, (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as she is deemed eligible.

The claimant has been overpaid benefits in the amount of \$2,950.00, for the weeks between November 27, 2021 through January 29, 2022. The claimant is required to repay the benefits since the employer participated in the fact-finding interview. The employer's account shall not be charged.

The claimant has not received FPUC benefits after her discharged from the employer on November 22, 2021. As a result she has not been overpaid FPUC benefits in connection with her discharged from employer on November 22, 2021.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

February 28, 2022
Decision Dated and Mailed

cs/scn

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.