

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LUZ M HERNANDEZ
Claimant

RANDSTAD US LLC
Employer

APPEAL 19A-UI-10181-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/17/19
Claimant: Respondent (2)

Iowa Code § 96.5(2) a – Discharge for Misconduct
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/appellant filed an appeal from the December 12, 2019 (reference 02) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on January 17, 2020. The claimant, Luz M. Hernandez, participated personally. The employer, Randstad US LLC, participated through witness Markie Bacon. The administrative law judge took official notice of the claimant's administrative records, including the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can 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: This employer is a temporary employment firm and the claimant worked as a temporary employee. Her last job assignment was at Gifford and Brown working as a full-time assembler. Claimant's working hours were 7:00 a.m. to 3:30 p.m. Monday through Friday each week. Ms. Bacon was claimant's immediate supervisor.

The employer has a written attendance policy which states that an employee may not miss work during the first 45 days of employment with the employer. Claimant began working for this employer on May 29, 2019.

Claimant was discharged due to absenteeism. The final incident leading to discharge occurred on November 4, 2019 when the claimant arrived to work at 8:00 a.m. instead of her scheduled starting time of 7:00 a.m. Claimant was tardy to work because she was responsible for taking

her minor children to school and school began after 7:00 a.m. Claimant did not have a babysitter or other type of care for her minor children for the time before school.

Claimant had consistently been arriving late to work because of this issue. This matter came to Ms. Bacon's attention and she met with the claimant in person on October 23, 2019. Ms. Bacon informed the claimant that she needed to work her scheduled shift of 7:00 a.m. to 3:30 p.m. Monday through Friday. Claimant was told that her job was in jeopardy if she continued to be tardy to work. Claimant continued to be tardy to work on October 24, October 25, October 28, October 29, October 30, October 31, and November 1, 2019. She was tardy each of these days because she was taking her children to school.

The administrative records establish that the claimant has received unemployment insurance benefits of \$2,216.00 from November 17, 2019 through January 11, 2020. The employer did not participate by telephone in the fact-finding interview. The employer provided documentation regarding the reason for discharge from employment but did not list any dates of absenteeism, or note any dates of previous discipline provided to the claimant.

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).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, **lack of childcare**, and oversleeping is not considered excused. *Id.* at 191 (emphasis added). 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 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. 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).

The claimant had received a verbal warning for her failure to report to work as scheduled at 7:00 a.m. She knew that she needed to come to work on time. However, she continued to be tardy to work due to her personal obligations in taking her children to school. Her absences from October 24, 2019 through November 4, 2019 were all due to this reason and are considered unexcused because a lack of childcare is not a good cause reason to be tardy to work.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on November 4, 2019 was unexcused. The final absence, in combination with the claimant’s history of unexcused absenteeism, amounts to job-related misconduct. Benefits are denied. Because benefits are denied, the issue of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7) a-b provides in 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 in part:

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—sub rule 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.

(emphasis added).

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 those 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).

In this case, the claimant has received benefits but was not eligible for those benefits. The employer did not participate by telephone in the fact-finding interview. A review of the administrative records established that the employer failed to present sufficient detailed information about the dates of the absences and any dates of previous discipline regarding absenteeism. This lack of sufficient documentation does not meet the requirements of participation under Iowa Admin. Code r. 871-24.10. As such, the claimant is not obligated to repay to the agency the benefits she received in connection with this employer's account, and this employer's account may be charged for benefits paid.

DECISION:

The December 12, 2019 (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for job-related misconduct on November 4, 2019. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her separation date, and provided she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits of \$2,216.00 from November 17, 2019 through January 11, 2020 but is not obligated to repay the agency those benefits because the employer did not sufficiently participate in the initial fact-finding interview. The employer's account may be charged for benefits paid.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn