

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

PAULA A KAUFMANN
Claimant

THRIVE TOGETHER LLC
Employer

APPEAL 22A-UI-16226-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/17/22
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Paula A Kaufmann, filed an appeal from the August 11, 2022, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion the claimant was discharged for non-disqualifying conduct. The parties were properly notified of the hearing. A telephone hearing was held on September 14, 2022. The claimant participated and testified. The employer participated through General Manager David Hintz. The employer was represented by John O’Fallon. Official notice was taken of the administrative records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant is overpaid benefits? Whether the claimant is excused from repaying the benefits she received due to the employer’s non-participation at factfinding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked part-time as a server from February 8, 2016, until this employment ended on July 15, 2022, when she was terminated. General Manager David Hintz was the claimant’s immediate supervisor. The claimant worked shifts on Sundays, Thursdays, and Fridays, with varying start times and duration. Schedules begin on Tuesday.

The employer has an attendance policy. The attendance policy states the employer expects employees to inform management they anticipate an absence at least four hours in advance. The policy states that a no-call / no-show is terminable after one offense.

On July 10, 2022, the claimant was scheduled to work from 11:00 a.m. to 4:30 p.m. The claimant drove home from work to take some medication during a break. The medication had a

sedative effect on the claimant such that she lost consciousness. The claimant did not awake until after her shift ended that day. The claimant sent a message to the manager on duty informing her of the circumstances. The claimant was not formally disciplined after this incident.

On July 24, 2022, the claimant arrived at 11:30 a.m. for a shift with an 11:00 a.m. start time. It was a double shift with the second shift beginning at 4:00 p.m. The claimant could not clock in late without speaking to Mr. Hintz first. Mr. Hintz asked, "Do you want to work here?" Mr. Hintz was angry. The claimant said she did want to work there that day. Mr. Hintz informed the claimant that she had already been covered that day because she was so late. Given that information, the claimant drove off because Mr. Hintz had just informed her that she was not going to work the first part of her shift. Within an hour of her leaving, the claimant was removed from a Facebook page the employer's staff used for the restaurant. The claimant inferred from these circumstances that she was terminated. The claimant was not scheduled to work in the following pay period.

The following findings of fact display findings needed to resolve the participation issue:

The claimant has received \$150.00 gross in unemployment insurance benefits after she separated from this employer.

On August 1, 2022, Iowa Workforce Development Department sent a notice of factfinding to the parties informing them of an interview date on August 8, 2022 at 2:20 p.m. The employer participated through Claims Analyst Christina Swedberg. Ms. Swedberg did not have personal knowledge or experience regarding the circumstances of the claimant's separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer has not met its burden to show the claimant was discharged due to job related misconduct. The overpayment issue is moot because the claimant is entitled to benefits.

Credibility Analysis

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's description of the claimant's description of what occurred on July 24, 2022, as generally consistent. However, the parties diverge regarding the claimant's start time that day, as well as the circumstances necessary to determine which party severed the employment relationship.

The administrative law judge finds the employer's testimony regarding the claimant's start time and when she arrived for that shift on July 24, 2022, as more credible than her testimony. He makes this finding because the employer had access to these records. The employer's description is also more consistent with the claimant's general description of her start time. The claimant's testimony on this point, that she was a mere minute late, also appeared to be transparently self-serving to the point that the two party's common description in which a dispute erupts into a somewhat ambiguous separation no longer makes sense.

The administrative law judge finds the claimant's testimony regarding the circumstances surrounding the dispute on July 24, 2022, more credible than the employer's testimony. Similarly, the employer's testimony on this point appears so self-serving as to what both agree occurred later to be absurd. If Mr. Hintz' calmly asked the claimant if she wanted to continue working there and she could have continued working her shift, there is seemingly no rational explanation for her reaction. Similarly, Mr. Hintz' other testimony underscores his agitation with past absences.

Finally, the administrative law judge finds the claimant's attendance history consists of two incidents, one tardy incident on July 10, 2022 and one attendance incident on July 24, 2022. To the extent, Mr. Hintz' conclusory allegation that the claimant was habitually truant is construed to be perhaps a routine violation of failing to give the two hours of requisite notice, but not credible testimony regarding the existence of other genuine attendance incidents. In any event, the rule stated below states each incident must be specifically alleged to be considered.

Applicable Law

On June 16, 2022, Gov. Reynolds signed into law House File 2355, which among other things amended Iowa Code 96.5(2) to further define misconduct and to enumerate specific acts that constitute misconduct. The bill did not include an effective date and so took effect on July 1, 2022. See Iowa Const. art. III, § 26; Iowa Code § 3.7(1). The claimant's separation occurred after July 1, 2022, therefore to the extent the new law's application is different, it applies.

Quit or discharge?

The employer contends this is a quit case. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

The administrative law judge finds this case is more properly evaluated as a termination case because the employer severed the claimant's employment relationship after she left the premises on July 24, 2022. It is uncontroverted that the claimant did not state she quit at any time. The claimant's leaving on that day is not evidence of her intent to quit. She stated she wanted to continue working there, but was not permitted to begin her shift because the employer had already found coverage. The employer then terminated her.

Termination Analysis

Iowa Code section 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 IAC 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.

Iowa Code section 96.5(2)b, c and d provide:

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:
 - b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.
 - c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.
 - 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 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Iowa Admin. Code r. 871-24.32(4) and (7) provide:

(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.

(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 absences are not considered misconduct unless unexcused. 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); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 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. *Gaborit*, supra. 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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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

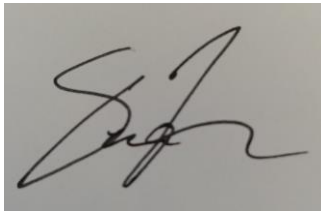
such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The claimant in this case had one absence occurring on July 10, 2022, and a thirty-minute tardy incident occurring on July 24, 2022. The Iowa Supreme Court stated the following "contributing" factors have been used by courts in the past: (1) the nature of the claimant's work, (2) the impact of the claimant's absence, (3) dishonesty by the claimant regarding the absence, and (4) whether the claimant made any attempt to notify the employer of the absence. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895, 897 (Iowa 1989). This should not be construed to be an all-inclusive list of factors that can be evaluated by a court. This administrative law judge adds that ultimately these factors are merely means of evaluating aggravating circumstances.

He adds that it is entirely consistent with the statute and case law to find the claimant's absence on July 10, 2022 to count as an absence, but to be significantly mitigated by the unexpected sedative effect of the medicine that robbed her of consciousness to make the choice to inform the employer or return to work. In this context, this absence is significantly mitigated, especially given the claimant informed the employer of the reason for her lack of notice. He finds only the fourth factor present regarding either absence here. As stated above, that is mitigated by the circumstances of the larger absence on July 24, 2022. Taken together, the administrative law judge finds the employer has not met its burden of proof regarding misconduct. Benefits are granted, provided she is otherwise eligible.

DECISION:

The August 11, 2022, (reference 01) unemployment insurance decision is AFFIRMED. The employer has not met its burden to show the claimant's absenteeism was excessive such to constitute misconduct. Benefits are granted, provided the claimant is otherwise eligible.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

October 7, 2022
Decision Dated and Mailed

smn/sa

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: 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
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: 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.