

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEYSSI PRADO
Claimant

APPEAL 21A-UI-24010-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION
Employer

OC: 09/26/21
Claimant: Appellant (4R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Admin. Code r. 871-24.10 – Overpayment of Benefits / Employer Non Participation
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The employer, Pella Corporation, filed an appeal from the October 18, 2021, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but willful misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on December 17, 2021. The claimant participated. The employer participated through Human Resources Manager Julie Wolf, Department Manager Matt Gentry, and Human Resources Representative Mary Van Essen. Official notice was taken of the agency records. Exhibits 1, 2, 3, 4, 5, 6, and 7 were received into the record.

The hearing notice had a defect regarding overpayment in that it did not list Iowa Code 96.3(7). Although the corresponding administrative rule Iowa Admin. Code r. 871-24.10 is listed, this regards what constitutes as participation under Iowa Code 96.3(7)(b). The rule does not state whether benefits paid in error shall be recovered in other cases. This defect could not be waived because the claimant was not present.

ISSUES:

Whether the claimant's separation was disqualifying?

Whether the claimant was overpaid benefits? Whether she is excused from repaying those benefits due to the employer's non-participation at fact-finding?

Whether the claimant is able and available for work?

FINDINGS OF FACT:

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

The claimant was employed full-time as a builder from March 1, 2021, until this employment ended on October 1, 2021, when she was discharged. The claimant reported directly to Department Manager Matt Gentry.

The employer has an attendance policy that is contained in its employee handbook. The employer's policy is a no-fault policy that does not distinguish between absences justified by illness or other forms of absences. An employee is supposed to inform their immediate supervisor of an anticipated absence either through a phone call or text prior to the start of their shift. All employees receive training on the attendance policy at the time of their hire. They are also informed about the provisions of the attendance policy if they are issued discipline under the policy. The employer provided its corrective action procedure which lists, "[E]xcessive absenteeism or tardiness" as a class three violation which can lead to discharge if three or more infractions occur in a one-year timeframe. (Exhibit 1)

The employer provided an absence report showing the claimant's absences over the course of her employment. (Exhibit 7) The employer provided written warnings and various other forms of discipline the claimant received over the course of her employment. (Exhibits 2, 4, 5, and 6) These documents are not described in greater detail because the details are not necessary to determine the case.

On September 22, 2021, the claimant called in prior to the start of her shift with proper notice and said she was ill. The employer's witnesses did not express skepticism about the claimant's reported illness.

On September 23, 2021, the claimant called in prior to the start of her shift with proper notice and said she was ill. The employer's witnesses did not express skepticism about the claimant's reported illness.

On October 1, 2021, the claimant was terminated because her final two absences were sufficient to trigger termination under the employer's attendance policy. The employer provided a copy of the claimant's discharge notice. (Exhibit 3)

The employer's witnesses were not aware of circumstances that would suggest the claimant was unable or unavailable for work after her separation. The employer's witnesses had no information suggesting the claimant's absences related to illness due to a chronic condition.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged due to non-disqualifying circumstances. The overpayment issue is moot because the claimant's separation is not disqualifying.

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).

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).

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.

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.

The employer cannot meet its burden for misconduct here because it is uncontroverted the claimant's final absences which led to her discharge were properly reported and justified by illness. Such absences are explicitly excluded from the definition of misconduct in Iowa Admin. Code r. 871-24.32(7). It is true that the claimant had other absences on her record which were not properly reported and justified by illness.

The employer cannot use these incidents to prove its case because they are not current acts of misconduct. Past acts of misconduct can only be used by the employer to determine the magnitude of the pattern of misconduct. In other words, if the claimant's final absences had not been justified by illness and properly reported, then past acts could be used to show the pattern of absences was excessive. Since the final incidents are per se not misconduct, no such showing can be made here. Since the claimant's separation is non-disqualifying, the overpayment issue is moot.

The administrative law judge will now evaluate whether the claimant was able and available for work after her separation from the company.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

- (1) An individual who is ill and presently not able to perform work due to illness.

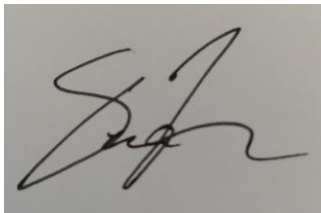
It is the claimant's burden to show she was able and available at the time of her separation on October 1, 2021. While there isn't anything in the record to suggest she was not able and available, this flips the inquiry on its head. The claimant did not provide testimony or other evidence to suggest she was able and available on October 2, 2021. As a result, the claimant is not able and available for work effective October 2, 2021.

DECISION:

The October 18, 2021, (reference 01) unemployment insurance decision is modified in favor of the appellant. The claimant's separation was non-disqualifying. The overpayment issue is moot. However, the claimant is not able and available effective October 2, 2021. Benefits are denied.

REMAND:

The administrative law judge is remanding to the Benefits Bureau the issue regarding overpayment of benefits given the claimant is not able and available effective October 2, 2021. The administrative law judge lacks the correct law code, Iowa Code 96.3(7), to make this determination on this decision.



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January 20th, 2022
Decision Dated and Mailed

smn/rs