

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRISHA L HART
Claimant

APPEAL 19A-UI-08927-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS LLC
Employer

OC: 10/20/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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, Lowe's Home Centers LLC., filed an appeal from the November 7, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 6, 2019. The claimant participated personally. Tina McCarty and David Woeckener testified for the claimant. The employer participated through Jake Rummery.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-19 were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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: The claimant was employed part-time as a customer service associate in the hardware department and was separated from employment on October 11, 2019, when she was discharged for excessive absenteeism.

The employer has a policy which requires employees to notify the employer two hours prior to a shift start if they will be absent. At the end of the claimant's employment, the employer expanded its attendance policy to state that an employee who called in one minute after the

start of shift would be treated as a no-call/no-show (versus call off) for disciplinary purposes. The claimant was trained on the employer's policies, including its attendance policies.

The undisputed evidence is the claimant received attendance warnings on September 28, 2018, April 27, 2019 and October 4, 2019. The claimant reasonably knew her job was in jeopardy.

On October 7, 2019, the claimant's car broke down en route to work. It was approximately 9:30 or 9:40 a.m. when the vehicle broke down in advance of her 10:00 a.m. shift. The claimant walked approximately one mile to an auto body shop to use the phone. She notified her employer that she would be absent due to the car issue. It was after her 10:00 a.m. start time when she called. Because she had prior warnings and because she called after the shift start time, (which the employer treated as a no-call/no-show) she exceeded the permissible attendance infractions and was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$925.00, since filing a claim with an effective date of October 20, 2019. Alex Starks, claims analyst for Thomas and Company, the employer's unemployment vendor, was called and a voicemail was provided. She/he did not respond. There is no evidence that the employer attempted to submit written participation in lieu of attending the fact-finding interview. Alex Starks did not attend the hearing to explain why she/he did not respond to the call or voicemail for the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's discharge from employment was not due to job-related misconduct according to Iowa law. Benefits are allowed.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a.

Iowa Admin. Code r. 871-24.32 provides, in relevant part:

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.

(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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *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). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

The administrative law judge is sympathetic to the employer, who clearly tried to work with the claimant by not moving forward with discharge sooner. The administrative law judge is also persuaded that the claimant's absence due to her car breaking down en route to work should be considered excused as well, because even though the claimant called in shortly after her shift started, and not in advance, she did notify the employer as soon as she reasonably could of the absence. Although common, there is no policy or applicable law which would have required the claimant to have a working cell phone on her person on October 7, 2019 when her car broke down so that she could call the employer earlier. Because the absence was due to other "reasonable grounds" and reported as soon as possible, the administrative law judge concludes the claimant's final absence would be considered excused for purposes of determining unemployment insurance benefits eligibility.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or *other reasonable grounds*, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has

not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The November 7, 2019 (reference 01) initial decision is affirmed. The claimant was discharged but not for disqualifying job-related misconduct. Benefits are allowed, provided she is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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