

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SONJA L PLOWMAN
Claimant

APPEAL 16R-UI-11974-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KEY WEST ANIMAL CLINIC INC
Employer

**OC: 08/21/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Definition of 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 filed an appeal from the September 9, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that the employer did not furnish sufficient evidence to show claimant was discharged for disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2016. The claimant, Sonja L. Plowman, participated, and was represented by Joseph Kane, attorney at law. The employer, Key West Animal Clinic, Inc., participated through Dr. Kim Bergfald; and Rose Bakey, bookkeeper. Claimant's Exhibits 1 through 6 and Employer's Exhibits A through D were received and admitted into the record.

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: Claimant was employed full time, most recently as a receptionist, from June 20, 2015 until August 22, 2016, when she was discharged.

The parties testified that claimant was initially scheduled to be on vacation from August 18 through August 29 for her wedding and honeymoon. Claimant last reported to work on August 10, 2016. That night, claimant went to the hospital and had an emergency appendectomy. Claimant texted Dr. Bergfald that night and let her know that she was having her appendix

removed. (Exhibit 5) On August 12, Dr. Bergfald texted claimant inquiring about her anticipated return-to-work date. (Exhibit 5) Claimant replied that she believed it would be several weeks, based on her recovery time from past surgeries. (Exhibit 5) Dr. Bergfald responded that it sounded like claimant would be back at work by the time she was originally scheduled to return from her wedding and honeymoon. (Exhibit 5)

On August 22, claimant sent Dr. Bergfald a text message updating her on her recovery from surgery. (Exhibit 5) Claimant stated she was not fully healed from surgery, but she was available for half-day shifts for that week. Claimant testified she was not yet released to work at that time, but she anticipated that she would be soon. Claimant reported she would be leaving for her honeymoon that Saturday, August 27, and would be gone for one week. (Exhibit 5) Claimant stated she would be available to work September 3. Dr. Bergfald replied and asked claimant to call her. (Exhibit 5) During a telephone conversation later that evening, Dr. Bergfald discharged claimant from employment. Dr. Bergfald told claimant that because she was not going to be able to return to work on August 30 as previously scheduled, she needed to look for other employment with a company that could handle her absenteeism. Claimant testified that she told Dr. Bergfald she was scheduled to see her doctor on August 24, but Dr. Bergfald denies claimant reported this information. Claimant provided documentation showing she was released to return to work on September 1, 2016. (Exhibit 6)

Sometime in May, claimant received a verbal warning based on her absenteeism. During this verbal warning, Dr. Bergfald reviewed claimant's attendance with her and claimant stated she would try to be at work on a more consistent basis. The employer does not have a formal attendance policy, and claimant did not receive any written warnings.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$858.00, since filing a claim with an effective date of August 21, 2016, until the week ending November 19, 2016. Specifically, claimant received gross weekly benefits in the amount of \$286.00 for the weeks ending September 10, September 17, and September 24. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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 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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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.

Here, the employer discharged claimant after learning that she had postponed her honeymoon and would be absent from work beyond August 30, when she was originally scheduled to return from her honeymoon. The employer did not ask claimant to reschedule this, as it had no coverage for her shifts beyond August 29. Claimant did not express an intent to miss work beyond August 29 in response to an ultimatum from the employer. The employer has not met its burden of proving that claimant was discharged from employment for either excessive, unexcused absenteeism or disqualifying misconduct. Benefits are allowed. As claimant's separation qualifies her to receive benefits provided she is otherwise eligible, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The September 9, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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