

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SURITA FLORES**

Claimant

**MERCY HEALTH SERVICES- IOWA CORP**

Employer

**APPEAL 21A-UI-20309-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/20/21**

**Claimant: Respondent (1)**

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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, Mercy Health Services Iowa Corp, filed an appeal from the September 3, 2021, (reference 01) unemployment insurance decision that granted benefits based upon the determination the claimant was discharged to a non-current act. The parties were properly notified of the hearing. A telephone hearing was held on November 3, 2021. The claimant did not participate. The employer participated through Colleague and Labor Relations Senior Partner Beckie Wahlberg and Director of Environmental Services Jon Starks. Official notice was taken of the agency records. Exhibits 1 – 15 were received into the record.

**ISSUES:**

Whether the claimant's separation from employment was disqualifying?  
Whether the claimant has been overpaid benefits?

**FINDINGS OF FACT:**

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

The claimant was employed as an environmental services technician from August 5, 2019, until this employment ended on June 22, 2021, when she was discharged. The claimant reported directly to Susan Frahm.

The employer has a no fault attendance policy. If an employee has 10 absences within a 12 month period, then they are to be terminated. The only exception is if an employee is absent due to being sick for consecutive days, the attendance policy will only count that string of absences as one occurrence. Each department has an unwritten rule regarding the amount of time an employee prior to their shift they should inform their supervisor of an anticipated absence. The environmental services department required the claimant to report an anticipated absence at least two hours prior to the start of her shift. The claimant had access to the attendance policy through the use of the employer's Intranet. The policy was also reviewed at

each stage of discipline and during orientation. The employer provided a copy of the attendance policy. (Exhibit 4)

On June 22, 2021, the claimant was terminated by Director of Environmental Services Jon Starks for excessive absenteeism. The termination notice states the claimant was absent on June 11, 2021, April 22, 2021, March 22, 2021, February 25, 2021, January 7, 2021, November 5, 2020, July 31, 2020, July 10, 2020, June 30, 2020 and June 18, 2020. Mr. Starks testified that the claimant called prior to start of these shifts and gave the excuse that she was sick for each occurrence. The employer provided a copy of the termination notice given to the claimant. (Exhibits 2 and 3)

Mr. Starks maintains the claimant did not call more than two hours before each shift per the attendance policy. Mr. Starks testified the claimant was not terminated until this date because he was not available sooner for the meeting. The employer provided a copy of the attendance tracking for each occurrence that led to the claimant's discharge. (Exhibit 5)

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. The administrative law judge concludes the overpayment issue is moot because the claimant is entitled to benefits.

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.

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.

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). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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.** [Emphasis added]

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.

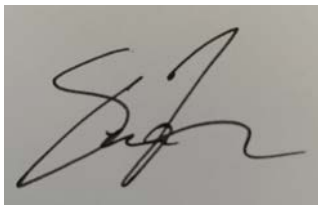
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dept 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 Dept of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established the claimant was warned regarding her attendance. However, every absence is per se not misconduct under Iowa Admin. Code r. 871-24.32(7) because each absence was properly reported and due to illness.

While the employer maintains the claimant’s attendance history demonstrates misconduct due to her not giving enough advance notice, the administrative law judge disagrees. All that is required is that an employee give the employer reasonable notice about an anticipated absence. Assuming reasonable notice is given, if the justification for the absence is an illness, then it cannot constitute misconduct per se. Benefits are granted.

**DECISION:**

The September 3, 2021, (reference 01) unemployment insurance decision is affirmed. The 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.



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Sean M. Nelson  
Administrative Law Judge  
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December 3, 2021  
Decision Dated and Mailed

smn/scn