

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHELLE SEGOVIA
Claimant

APPEAL 21A-UI-16676-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY
Employer

**OC: 05/02/21
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
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer, Casey's Marketing Company, filed an appeal from the July 20, 2021, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but no work-related misconduct could be shown. The parties were properly notified of the hearing. A telephone hearing was held on September 21, 2021. The claimant participated. The employer participated through Store Manager Brandy Van Arkel. The employer's proposed exhibits were not admitted because neither the claimant nor the employer's witness were aware of their contents.

ISSUES:

Whether the claimant's separation from employment is disqualifying?
Whether the claimant has been overpaid benefits? Whether the claimant is excused from repaying those benefits due to the employer's non-participation at fact finding?
Whether the claimant has been overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits?

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 kitchen manager from November 25, 2020, until this employment ended on March 13, 2020, when she was discharged. The claimant's immediate supervisor was Store Manager Brandy Van Arkel.

The employer has an attendance policy that is contained in its employee manual. The employee manual states an employee is expected to notify the employer preferably two hours before an anticipated absence. The employer does not have a written rule stating if an employee does not report to work for three consecutive days without notice they are considered

a voluntary quit. The employee manual is located on the employer's intranet system called ADT. The claimant had access to the policy.

On March 13, 2021, the claimant was scheduled from 2:00 p.m. to 10:00 p.m. The claimant sent a text message at 3:39 p.m. to Brandy Van Arkel's phone asking if she could leave early because she was still experiencing symptoms of an illness. At 3:50 p.m., Ms. Van Arkel said whether she could leave the store early was up to a coworker working that shift, Daniel Cutler. Mr. Cutler agreed that the claimant could leave early that night. The claimant left the store at 6:45 p.m. Just prior to leaving, the claimant spoke with Mr. Bergman. During that conversation, Mr. Bergman told the claimant to take off the days she needed to recover from her illness. He assured her that he would find coverage for her.

On March 14, 2021, the claimant was scheduled to work from 2:00 p.m. to 10:00 p.m. The claimant did not report to work on that day.

On March 17, 2021, the claimant was scheduled to work from 2:00 p.m. to 10:00 p.m. The claimant did not report to work on that day.

On March 18, 2021, the claimant was scheduled to work from 2:00 p.m. to 10:00 p.m. The claimant called Assistant Store Manager Linn Fisher using her boyfriend's phone about coming in to work on that day. Fisher informed the claimant that she should speak with Mr. Bergman. The claimant then spoke with Mr. Bergman. Mr. Bergman told the claimant she was being terminated. Mr. Bergman did not clarify why she was being terminated.

The claimant had never missed a day in the past. She had never been subject to discipline under the employer's attendance policy.

The administrative record KFFV shows the parties were sent a notice of fact finding on July 2, 2021 for a fact-finding interview occurring on July 16, 2021 at 9:20 a.m. The claimant attended the call. She was informed by the Iowa Workforce Development representative that the employer participated by providing documents.

REASONING AND CONCLUSIONS OF LAW:

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

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).

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.

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 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.*

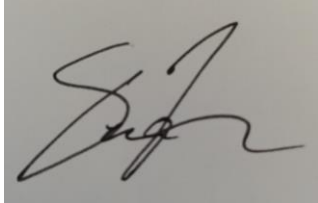
After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

In particular, the administrative law judge finds the claimant's allegation that Mr. Bergman assured her that her shifts would be covered credible. The administrative law judge finds the claimant's allegation credible because she is the only one who was able to provide first-hand testimony regarding this conversation given the absence of Mr. Bergman.

The employer has not met its burden in this case. The record establishes that the claimant left work with Ms. Van Arkel's approval on March 13, 2021, due to an underlying illness. The claimant credibly alleged Mr. Bergman assured the claimant he would cover her shifts. Despite this assurance, the claimant was terminated on March 18, 2021 by Mr. Bergman.

DECISION:

The July 20, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. The overpayment issue is moot because the claimant's discharge was not disqualifying. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is shown on a light gray background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

September 29, 2021
Decision Dated and Mailed

smn/mh