

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**VICKI L SCHULTZ**  
Claimant

**DIAMOND JO WORTH LLC**  
Employer

**APPEAL 16A-UI-05458-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/17/16  
Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
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 May 3, 2016 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 31, 2016. Claimant participated. Employer participated through representative Thomas Kuiper and director of human resources Brandy Kozlowski. Director of food and beverage David Barnes attended the hearing on behalf of the employer but did not testify.

**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 as a shift supervisor (food and beverage) from July 16, 2008 and was separated from employment on April 1, 2016, when she was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving twelve points in a rolling 12-month period. Employees are required to call the employer at least two hours prior to their scheduled shift if they are going to be absent. Claimant was aware of the employer's policy.

The final incident occurred when claimant was absent on March 23, 2016 for her shift. Claimant called the employer at 1:52 p.m., to report she was going to be absent because of weather. Claimant was scheduled to work at 3:00 p.m. The employer did not close on March 23, 2016 because of weather and did not consider the roads bad. Other employees worked on March 23, 2016. Claimant was given points for being absent and not properly following the call off procedure (employees are to call off at least two hours prior to the start of their shift).

Claimant was last warned on January 27, 2016, that she faced termination from employment upon another incident of unexcused absenteeism. Claimant was also issued a final written warning for her attendance infractions on August 13, 2015. Since 2015, claimant received points and reported her absences as illness (four times), other (four times), tardy (once), son's illness (once), and weather (once). Claimant had been on Family and Medical Leave Act (FMLA) leave during her employment. Claimant's FMLA leave was exhausted when she was released to return to work in 2016. Ms. Kozlowski testified that some of claimant's absences under FMLA may have been listed as other and may have counted against her (counted as attendance points). Claimant was absent from work and tardy because of weather on three occasions, but the employer did not assess any points. If the interstate is closed because of weather, the employer does not impose any attendance points.

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

For the reasons that follow, the administrative law judge concludes the 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(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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful

misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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 absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Although claimant was warned that her job was in jeopardy because of attendance issues, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Approximately half of claimant's absences since 2015 were due to a reported illness. Furthermore, there was testimony that claimant had FMLA leave until 2016 and some of the absences coded as other may have been covered by FMLA yet resulted in points. Although claimant's last absence because of weather may not have been excused, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

The employer has not met its burden of proof to establish misconduct. The employer has failed to show claimant had excessive absences are not considered excused for the purposes of unemployment insurance eligibility. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**DECISION:**

The May 3, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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