

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MELODY M PRESSWOOD
Claimant

DUBUQUE COUNTY
Employer

APPEAL NO. 20A-UI-02145-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/09/20
Claimant: Appellant (2R)

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 28, 2020, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on April 22, 2020. Claimant participated personally. Employer participated by Cris Kirsch.

ISSUES:

Whether claimant was discharged for misconduct?

Whether claimant has been overpaid benefits in this matter?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on February 11, 2020.

Employer discharged claimant on February 12, 2020 because claimant had accumulated points in excess of those necessary to terminate under employer's attendance policy. Claimant's last, most recent violation of the attendance policy occurred when she called off from work on February 6, 2020 as a result of having moved the day before.

Employer did not know specifics about how claimant had picked up points. Employer acknowledged that claimant had worked extra hours in order to remove points that had been accumulated. Employer did not know how many hours had been reduced from claimant's total points.

Employer stated that claimant received a written warning at 4.75 points on December 12, 2019. Claimant stated that since that date she'd worked overtime on at least 10 occasions. Neither party knew exactly how many points had been put on or taken off from claimant's total.

Claimant stated on multiple occasions that her mental health difficulties kept her from being able to work on many occasions. It is unknown as to whether claimant is able and available for work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc.*

v. Emp't Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).*

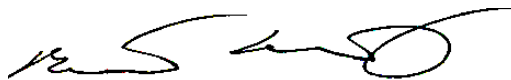
The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. 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 Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).* *Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984),* held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. *Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa Ct. App. 1982).* While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. The last incident, which brought about the discharge, fails to constitute misconduct because employer did not prove up the specific dates when claimant picked up points for absenteeism and times when claimant's overtime work reduced her attendance points. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

This decision has not addressed whether claimant is able and available for work. That issue will be remanded to the fact finder.

DECISION:

The decision of the representative dated February 28, 2020, reference 01, is reversed on the issue of separation and remanded to the fact finder on the issue of whether claimant is able and available for work. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.



Blair A. Bennett
Administrative Law Judge

April 23, 2020
Decision Dated and Mailed

bab/scn