

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DEANNA R HARRIS**  
Claimant

**LACOSTA INC**  
Employer

**APPEAL 17A-UI-09938-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/03/17**  
**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 September 20, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer did not establish willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on October 13, 2017. The claimant, Deanna R. Harris, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, Lacosta, Inc., participated through Josh Myers, Supervisor; and Ethan Marbery, Operations Manager. The administrative law judge took official notice of the administrative 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 janitor, from December 1, 2016, until June 2, 2017, when she was discharged for attendance issues. Claimant's final incident occurred on June 1, 2017, when she was three hours late to work. Claimant was expected to call or text Marbery if she was going to be late, but she did not do either.

On April 24, 2017, claimant met with Marbery and Myers to discuss her attendance and the possibility of full-time work with the employer. The employer extended her an offer for full-time janitorial work. She was also given the equivalent of a final warning related to her attendance. The employer told her that she could have one late arrival and no unexcused absences within her first sixty days as a full-time employee.

Following this meeting, claimant had numerous absences. On May 2, claimant departed early. On May 9 and 10, claimant departed early. On May 12, claimant was absent for an unknown reason. On May 18, claimant was absent because her child was ill and could not attend daycare. Claimant left early from work on May 22. On May 23, claimant was absent. Claimant left early on May 25, and she arrived late and left early on May 26. Claimant was absent on May 29, and on May 30, claimant arrived late and departed early. Claimant received a verbal warning after the May 18 absence, and she received a written warning after the May 25 absence.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$820.00, since filing a claim with an effective date of September 3, 2017, for the five weeks ending October 7, 2017. 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, provided she is otherwise eligible.

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).

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.

While an employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits, the employer discharged the claimant contrary to the terms of its own warning to her. At the end of April, claimant was told she could not have any additional unexcused absences and she could only have one late arrival before she would be discharged. However, the employer allowed claimant multiple absences, late arrivals, and early departures after that point. Claimant could not have reasonably known that her job was in jeopardy because of her attendance, as the employer did not follow its own warning to her. Inasmuch as employer had not effectively warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As claimant's separation from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

**DECISION:**

The September 20, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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