IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHRISTOPHER D JONES Claimant **UNIPARTS OLSEN INC** Employer	**APPEAL 18A-UI-12230-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/25/18** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism
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 December 13, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 16, 2019. Claimant participated and testified. Employer participated through Human Resource Manager Toni Fernihough. Employer's Exhibits 1 through 5 and claimant's Exhibits A through H were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying misconduct?
Has the claimant been overpaid benefits?
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on May 23, 2018. Claimant last worked as a full-time machine operator. Claimant was separated from employment on November 27, 2018, when he was discharged.

The employer has a points-based attendance policy in place. (Exhibit 3). Employees are allowed up to six points in a rolling 12-month period. A full point is issued for absences of four hours or more and a half point is given for absences less than four hours. Progressive discipline is issued as follows: two points is a verbal warning, a written warning at four points, suspension at five points, and termination when an employee reaches six points. Claimant received a copy of and was aware of this policy. (Exhibit 4).

Over the course of his employment, claimant was absent from work a total of 22 times and missed partial days of work an additional three dates. Claimant provided doctor's notes and had 16.5 of his points removed as being excused. Claimant only worked a partial day on June 11 because he left work to go to the hospital after his first grandchild was born. He was

absent from work on July 16 for medical reasons. On three of the dates, September 17, November 20, and November 21, claimant was absent because his vehicle was broken down and he was unable to get into work. (Exhibit D). Claimant's was absent a partial day on October 26 and full day on October 29 because one of his coworker's was threatening violence. (Exhibit A). The final absence, November 26, 2018, was because claimant could not get to work due to inclement weather.

The employer did not have any record of claimant being given a verbal warning for his attendance, but he did receive a written warning on November 8, 2018. The November 8 warning indicates if claimant's attendance does not improve he will be suspended. The employer testified claimant was issued a second written warning and suspension on November 21, 2018. (Exhibit 2). The warning advises that if claimant accrues another point he will be terminated and indicates he refused to sign. Claimant testified he never received this warning and was not even at work on November 21, 2018. The employer could not explain how this warning was issued to claimant on a day in which he was not at work. On November 26, 2018, claimant called in to work, as he was unable to get in due to a snow storm. The employer had sent out an email informing first and third shift employees that absences due to weather on November 26 would be excused. Claimant testified he believed this applied to second shift workers, such as himself, as well. Claimant further testified that multiple other second shift employees called in due to weather that day and were not issued points. Fernihough could not say whether or not this information was accurate.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 25, 2018. The claimant filed for and received a total of $2,001.00 in unemployment insurance benefits for the weeks between November 25, 2018 and January 12, 2019. Both the employer and the claimant participated in a fact finding interview regarding the separation on December 12, 2018. The fact finder determined claimant qualified for benefits.

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.

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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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).

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.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. 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

Claimant was absent from work over the course of his employment for a variety of reasons, some of which, like those due to illness, that are excused and others, like those related to transportation, which were not. Claimant's final absence was because he was not able to come

in to work due to severe weather. Claimant testified multiple employees called in for the same reasons and their absences were excused. The employer was unable to refute this testimony. As such, the final absence was excused. Because his last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined.

Even if the final absence were not excused, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer's testimony that claimant was issued the warning on November21, 2018 advising him that a failure to improve his attendance would result in termination is simply not credible given that claimant did not sign the document and was not even at work on the date it was alleged to have been issued. Inasmuch as employer had not previously warned claimant that further incidents could result in 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 benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The December 13, 2018, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs