

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ZACHARY S BROWN**  
Claimant

**GLOBAL SPECTRUM LP**  
Employer

**APPEAL 17A-UI-05390-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/29/16  
Claimant: Respondent (2)**

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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 10, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 14, 2017. The claimant was initially present at the beginning of the hearing, but was disconnected prior to any testimony being given. The administrative law judge tried to reconnect with claimant, but he did not answer his phone, nor did he attempt to call the appeals bureau to rejoin the hearing and therefore did not participate. The employer participated through Director of Finance Diane Frischmeyer. Employer's Exhibits 1 through 3 were received into evidence. Official notice was taken of the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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 part time as a building attendant from November 9, 2016, until this employment ended on April 20, 2017, when he was discharged.

The employer has a points-based attendance policy in place. (Exhibit 3). Employees are allowed to accumulate 15 attendance points within a six month period before being terminated. Employees are issued a written warning after accumulating ten points. If an employee is absent due to illness, they are not issued points if they submit a doctor's note confirming that illness was the reason for the absence. Claimant was given a copy of this policy at the time of his hire.

Since claimant was hired in November 2016, he was absent from work five times and tardy to work three times. Claimant never claimed any of his attendance issues were due to illness and no doctor's notes were ever produced. The final absence occurred on April 14, 2017, when claimant called in four minutes after his shift was scheduled to start to report he would be absent. Prior to this claimant had been warned, on December 23, 2016, that his attendance was an issue and needed to improve or he would face termination. (Exhibit 1). Claimant was absent from work three more times after being given this warning. The employer offered the claimant the opportunity to provide medical documentation for his absence on April 14, but none was provided. As claimant's April 14 absence put him over the allowed number of points, his employment was terminated. (Exhibit 2).

The claimant filed a new claim for unemployment insurance benefits with an effective date of May 29, 2017. The claimant has not received any unemployment insurance benefits to date. The employer did not participate in the fact finding interview regarding the separation on May 9, 2017. 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 due to job-related misconduct.

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.

- 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.

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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Here, the claimant was tardy to or absent from work a total of eight times between his hire in November 2016 and termination in April 2017. Claimant's final absence occurred on April 14, 2017. Claimant gave no indication that his final absence was due to illness, injury, or other good cause, but was nevertheless given the opportunity to provide medical documentation that would support his absence. No such documentation was provided. Prior to his April 14 absence, claimant had been warned that his attendance was an issue and may lead to termination. The employer has established that the claimant was warned that further

unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld. As claimant has not been paid any benefits to date, the issues of overpayment and participation are moot.

**DECISION:**

The May 10, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs