

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN T SIDERS
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 17A-UI-02497-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/28/16
Claimant: Respondent (1)

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 February 24, 2017, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 28, 2017. Claimant participated. Employer participated through unemployment insurance consultant Alisha Weber and store manager Connie Meyers. Dawn Runde registered for the hearing on behalf of the employer, but she did not attend the hearing. Official notice was taken of the administrative record of claimant's benefit payment history and wage history, with no objection.

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 part-time as a store employee from October 12, 2016, and was separated from employment on February 6, 2017, when he was discharged.

The employer has a written attendance policy in the employee handbook. The policy provides that if an employee has two no-call/no-shows within a year they are automatically discharged. The employer requires employees call the employer two hours prior to their shift to report their absence. If an employee is supposed to work, but they cannot work and they properly call off, it is considered an unscheduled absence. The employer considers two or more unscheduled absences to be excessive. Excessive absenteeism may result in discharge. Claimant was aware of the policy.

Claimant was scheduled to work on February 4, 2017 from 4:00 p.m. to 11:15 p.m. Claimant got sick the night before and was unable to come to work on February 4, 2017. On February 4, 2017, claimant called the employer to report he would be absent due to illness. Claimant spoke to the second assistant manager around noon. In the middle of the conversation, claimant's phone died and the conversation ended. The second assistant manager did not advise claimant to call Ms. Meyers before claimant's phone died. Claimant did not contact Ms. Meyers because his phone was not working. Claimant did not leave the house on February 4, 2017. Ms. Meyers tried to call claimant on February 4, 2017, but she was unsuccessful.

Claimant was scheduled to work on February 5, 2017 from 4:00 p.m. to 11:15 p.m. On February 5, 2017, claimant stopped into the employer in the morning. Claimant told the kitchen manager that his phone was not working. Claimant told kitchen manager that he was not coming to work that night (February 5, 2017) because he was sick. Claimant did not believe he was mumbling. Claimant felt the kitchen manager was being hostile (raising her voice and seemed angry). Claimant was positive that he told the kitchen manager that he was not coming to work because he was sick. Claimant did not call the employer on February 5, 2017 because his phone was not working. Claimant did not report to work on February 5, 2017 because he was ill. Ms. Meyers tried to call claimant on February 5, 2017, but she was unsuccessful.

On February 6, 2017, claimant went to the doctor and he was advised to go to the emergency room due to dehydration. After claimant was released from the hospital in the evening on February 6, 2017, he went to the employer to check his schedule and drop off a doctor's note. Claimant's doctor's note excused him from work from February 4, 2017 through February 6, 2017. When claimant checked his schedule, he had been taken off even though he had been next scheduled to work February 8, 2017. Claimant called Ms. Meyers from the employer's phone. Claimant told Ms. Meyers he had a doctor's excuse for his absences. Claimant asked Ms. Meyers why he had been taking off the schedule. Ms. Meyers told claimant that he was discharged.

In November 2016, Ms. Meyers spoke to claimant about being late to work. Claimant had misread the schedule and Ms. Meyers told him he had to pay more attention. The employer did not give claimant any disciplinary warnings for absenteeism during his employment. Claimant was never warned his job was in jeopardy because of absenteeism. On January 30, 2017, claimant was given a final written warning for not wearing the proper food safety gloves when he was handling raw vegetables. Claimant was warned if this incident happened again he would be discharged.

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.

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*.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

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.*, 743 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 question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). Although claimant did not contact Ms. Meyers regarding his absences on February 4 and 5, 2017, he did not speak to the second assistant manager on February 4, 2017 and the kitchen manager on February 5, 2017. Claimant reported to both that he would be absent due to illness. Furthermore, claimant reported his absences to the employer at least two hours prior to the start of his shifts; thus, he substantially complied with the employer's procedure to report his absences. On February 6, 2017, claimant also tried to provide the employer with a doctor's note excusing his absences on February 4 and 5, 2017, but the employer discharged him.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's final absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Furthermore, inasmuch as employer had not previously 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. 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. Benefits are allowed.

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

DECISION:

The February 24, 2017, (reference 03) 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.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

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