

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JESSICA A ZIRTZMAN
Claimant

SEVENTH AVENUE INC
Employer

APPEAL 19A-UI-07447-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/30/18
Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Seventh Avenue (employer) appealed a representative's September 12, 2019 decision (reference 05) that concluded Jessica Zirtzman (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 14, 2019. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Samantha Geisler, Human Resources Coordinator.

The employer offered and Exhibit 1 was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 18, 2018, as a part-time line worker/pack-puller. The employer laid her off from lack of work from December 20, 2018, to June 20, 2019. She signed for receipt of the employer's handbook on October 18, 2018, and June 20, 2019. The handbook indicated that a percent of time away from work of 15.01 to 20.00 needed development and greater than twenty-percent was unsatisfactory.

The employer's records obtained by the human resources coordinator indicated the claimant was absent, tardy or left early on July 2, 3, 8, 11, 12, 15, 23, 30, 31, August 2, 5, and 6, 2019. This is a total of twelve absences. Records collected by the human resource clerk listed July 2, 3, 8, 16, 23, 30, August 2, 5, 6, 2019, as nine absences unrelated to the claimant's medical condition. The human resources coordinator, herself, did not keep records of whether all absences were properly reported or the reasons for the absences. July 11, 12, 15, 30, and 31, 2019, may have been due to the claimant's medical condition and properly reported.

On July 23, 2019, the employer issued the claimant a Performance Notification for a rule violation for attendance. It was a "Written Notification with Probationary Period from July 23,

2019, to October 23, 2019". Attached to the document was an explanation stating that from June 20, 2019, to July 21, 2019, her percent time away from work was 24.67%. The document stated, "You must improve your percent time away from work from this point forward by maintaining a competent level (<15.01%). If your time away from work exceeds (20.00%) at any time during your probation, your employment will be terminated."

The claimant properly reported her absence on August 12 and 13, 2019, because her child had to be taken to the emergency room and stay at the hospital for a prolonged period. The claimant was unable to work on August 13, 2019, because she had one hour of sleep before her shift. She provided a doctor's note to the employer and worked on August 14, 2019. The employer terminated her on August 14, 2019, because since July 23, 2019, her time away from work was 41.53%.

The claimant filed for unemployment insurance benefits with an effective date of December 30, 2019. The employer participated personally at the fact finding interview on September 10, 2019, by Samantha Geisler.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in

disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The employer has an obligation to provide details as to the specific reasons for the claimant's discharge. This employer was unable to provide sufficient information about whether the claimant properly reported her absences and the reasons for her absences. The information from the testifying coordinator was not consistent with the written information from the human resources clerk.

While it is true that an employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work, it is also true that the employer should gather that information for determination regarding whether the absences are excused. The employer has the burden of proof to show misconduct. Without inquiry, the employer has not provided sufficient evidence that the claimant's absences were unexcused.

The final incidents of absence on August 12 and 13, 2019, were properly reported and due to the claimant's child's serious illness. The claimant's absence when her child was in the emergency room cannot be considered misconduct. A parent's presence with their child in the hospital has no wrongful intent. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 12, 2019, decision (reference 05) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs