

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHARLENE T LEWINSON
Claimant

EYM KING OF IOWA LLC
Employer

APPEAL 17A-UI-05999-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/30/17
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:

EYM King of Iowa, LLC (employer) filed an appeal from the June 2, 2017, reference 07, unemployment insurance decision that allowed benefits based upon the determination it discharged Sharlene T. Lewinson (claimant) but failed to furnish information showing willful or deliberate misconduct on her part. The parties were properly notified about the hearing. A telephone hearing was held on June 28, 2017. The claimant participated. The employer participated through Market Manager Jennifer Oxenreider. Employer's Exhibit 1 was received.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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: The claimant was employed full-time as a Shift Manager beginning on June 22, 2016, and her last day worked was September 5, 2016. The claimant reported directly to General Manager John Bane. The employer has a policy that one no-call/no-show absence is considered job abandonment.

The claimant was scheduled to be off work on September 6, 2016, which was her first scheduled day off since August 15. On September 6, she sent a text message to Bane asking if she could take the following day off work as well. She explained she was burned out and needed an additional day off. Initially, he denied her request, but later granted her the time off.

On September 8, 2016, the claimant reported to work and Bane gave her a termination notice completed by Market Manager Jennifer Oxenreider. The reason for the termination was two no-call/no-show absences on September 6 and 7. The claimant had not received any prior warnings related to attendance.

The administrative record reflects that the claimant has not received any unemployment benefits since filing a claim with an effective date of April 30, 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.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left her employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

If an employee is absent for three days without giving notice to the employer and the employer has a policy stating that three no-call/no-show absences are considered job abandonment, then the employee is presumed to have quit without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4). The employer's no-call/no-show attendance policy states job abandonment can occur after one absence. However, that policy does not comply with the rule used for determining unemployment insurance benefits eligibility which states an employee has voluntarily quit or abandoned his or her job after three no-call/no-show absences. Additionally, the employer testified the claimant had only two no-call/no-show absences, not the three required by the rule to consider the separation job abandonment. Therefore, the separation was a discharge and not a quit.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

The issue is not whether the employer made a correct decision in separating the 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

The fighting issue in this case is whether the claimant's absences on September 6 and 7 were excused. The employer argues the absences were not properly reported, rendering them unexcused. The claimant contends she had approval from management for both absences. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. The claimant presented direct, first-hand testimony while the employer relied upon second-hand reports; therefore, the claimant's recollection of the events is more credible than that of the employer.

The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. On September 6, the claimant was not scheduled to work so she was not absent from work. The next day, she had sought and received prior approval from her manager to not be at work. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and the charges to the employer's account cannot be waived.

DECISION:

The June 2, 2017, reference 07, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and the charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn