

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICOLE R DVORSKY
Claimant

APPEAL 16A-UI-02943-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DENNIS DAVIS INSURANCE AGENCY
Employer

**OC: 02/07/16
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, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 30, 2016. Claimant participated. Employer participated through insurance agent Dennis Davis and office manager Penny Davis. Employer Exhibit One, Two, and Three were admitted into evidence 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 full-time as a customer service representative from January 2015, and was separated from employment on February 8, 2016, when she was discharged.

The employer discharged claimant for unreliability and undependability because of her absences. The employer is a small office. Mr. Davis required someone in the office to make sure it was properly staffed from 8:30 a.m. to 5:00 p.m. The employer does not have an attendance policy. When claimant started with the employer, the employer was willing to work with claimant about her schedule if she needed to leave during the day for her kids.

The final incident occurred on February 8, 2016. On February 8, 2016, claimant was working her normal shift. Claimant got a call from her teenage daughter who was at school. Her daughter had an emergency and claimant had to go pick her up. Claimant went to Mr. Davis

and told him that she had to go pick up her daughter because of an emergency and she will use the time as her lunch; this was around 10:30 a.m. Claimant went the school, picked up her daughter, took her home for a change of clothes, and then dropped her back off at the school. Claimant was back at work within 30 minutes. Approximately ten minutes after claimant got back to work she was told she was discharged. Claimant felt that it was an emergency and she had to go pick up her daughter.

Claimant had prior warnings regarding her absences. On December 1, 2015, the employer put claimant on a six-month probation period. Employer Exhibit One. Claimant had missed three days (September 1 and 15, 2015 and December 1, 2015) of work for sickness with the same symptoms. Employer Exhibit One. Claimant was advised that her attendance record was unsatisfactory. Employer Exhibit One. Claimant was told that an evaluation will be done on May 31, 2016. Employer Exhibit One. Claimant was told that further unsatisfactory performance will result in termination. Employer Exhibit One. Claimant did not sign for the probationary notice because she did not agree with a couple of things in the probationary notice. Employer Exhibit One. Claimant was given a copy of the probationary notice. Claimant believed if she called in sick again her job was in jeopardy. After December 1, 2015, claimant was absent from work for her back on December 21 and 22, 2015. Claimant had a doctor's note covering those two days. The employer issued claimant a second warning for these absences. Employer Exhibit Three. Claimant was warned that another "unexcused absence [would] result in a [third] write up [and] possible termination of employment." Employer Exhibit Three.

The employer participated in the fact-finding interview.

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. 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*. See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

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*. An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. A majority of claimant's absences that resulted in her six-month probation were related to properly reported illness. Claimant's absences that resulted in her second written warning were related to a properly reported medical reason and she also provided a doctor's note to excuse her absences.

Claimant's last absence, leaving during the middle of the morning on February 8, 2016, was because of an emergency involving her daughter. Claimant informed the employer of the emergency and was willing to sacrifice her lunch break to handle the emergency. Claimant's absence may have been inconvenient to the employer, but it was related to a properly reported emergency. Although the employer may consider this absence to be unexcused, for the purposes of unemployment insurance benefits, this absence is considered excused. Because claimant's 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 and no disqualification is imposed. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, 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, 2016, (reference 01) unemployment insurance decision is affirmed. The 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

jp/pjs