

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JANA M GANT
Claimant

DUBUQUE COUNTY HISTORICAL SOCIETY
Employer

APPEAL 16A-UI-09553-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/31/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed an appeal from the August 22, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on September 19, 2016. The claimant did not participate. The employer Dubuque County Historical Society participated through Senior Manager of Admissions and Guest Services Nathaniel Wagner and Controller Thomas Lange. 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 café associate from March 17, 2015, until this employment ended on July 27, 2016, when she was discharged.

During the week of July 18, 2016, claimant's immediate supervisor, Beverly Heinze, was on vacation. During this week claimant arranged to have other employees cover several of her shifts. Claimant did this without notifying or getting permission from the individual acting as her supervisor that week, as is the typical protocol. (Exhibit 2, pg. 12). Additionally, when claimant could not find anyone to cover her shift on July 23, 2016, she was a no-call/no-show. Claimant had previously spoken to Heinze about getting someone to cover her shifts and was told if she could not get someone to cover, she was expected to be at work. Claimant was issued separate write-ups for both these incidents upon Heinze's return from vacation on July 26, 2016. (Exhibit 1). Prior to this, claimant was written up once before, on February 28, 2016, for being

tardy on February 13, 2016. As part of this warning, claimant was advised that further infractions may result in a review of her position.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 31, 2016. The claimant filed for and received a total of \$876.00 in unemployment insurance benefits for the weeks between July 31, 2016 and September 10, 2016. Both the employer and the claimant participated in a fact finding interview regarding the separation on August 19, 2016. 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 for no disqualifying reason.

Iowa Code section 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.

871 IAC 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). 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).

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 employer has not established that claimant had absences which would be considered both excessive and unexcused for purposes of unemployment insurance eligibility. Claimant was tardy once in February 2016 and was a no-call/no-show on July 23, 2016. Two unexcused absences over more than a year of employment do not meet the excessiveness standard. Because the employer has failed to show claimant’s absences were both unexcused and excessive, benefits are allowed.

The employer cited claimant’s failure to follow proper procedures in having other employees cover her shifts as a reason for terminating her employment. Claimant was issued her first, and only, warning for this type of behavior upon being terminated. 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. 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. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The August 22, 2016, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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