

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JENNIFER M ROSS**

Claimant

**APPEAL 16A-UI-13082-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COUNCIL BLUFFS COMM SCHOOL DIST**

Employer

**OC: 07/17/16**

**Claimant: Respondent (1)**

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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 November 28, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 29, 2016. Claimant participated. Employer participated through hearing representative Ted Valencia, chief human resources officer Toby Rees, human resource specialist Tammy Nielsen, and unemployment insurance consultant Phyllis Farrell. Employer exhibits 1, 2, 3, 4, and 5 were admitted into evidence with no objection.

**ISSUE:**

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 Para Educator from August 24, 2016, and was separated from employment on November 1, 2016, when she was discharged.

Under the collective bargaining agreement, employees are required to report to work on time. Employees are also required to provide notice through the AESOP (attendance reporting system) if they are going to be absent. Employees are supposed to report their absences at least one hour prior to the start of their shift. Under the collective bargaining agreement, new employees are on probation for the first seventy-five days and may be separated from employment for any reason during probation. Employer Exhibit 1. Claimant's probation was to expire on November 7, 2016. Under the collective bargaining agreement, the union may file a

grievance if an employee is wrongfully discharged. Employer Exhibit 1. Claimant was aware of the employer's policies and procedures.

The final incident occurred when claimant was absent from her scheduled shift on October 28, 2016. Employer Exhibits 2 and 5. Claimant was absent because she was sick. Employer Exhibits 2 and 5. On October 27, 2016, in the evening, claimant reported she was going to be absent on October 28, 2016 through the AESOP system because she was sick. Claimant went to the doctor on October 28, 2016 and obtained a doctor's note excusing her from work on October 28, 2016. Claimant provided the doctor's note to a secretary at the employer on October 31, 2016. On November 1, 2016, the employer told claimant she was discharged "[d]ue to [her] repeated unauthorized absences[.]" Employer Exhibit 4. A grievance has not been filed on claimant's behalf regarding her discharge.

Claimant had prior warnings about absenteeism. On September 12, 2016, the school administrative manager told claimant that she needs to report her absences in AESOP. Claimant had not been reporting her absences in AESOP. Claimant would either be a no-call/no-show or she would call the school secretary and report her absences. On September 13, 2016, the school administrative manager sat down with claimant and explained to her how to use AESOP. Employer Exhibit 3. The school administrative manager also gave claimant the school administrative manager's cell phone number and told her that if she had trouble using AESOP she could use e-mail to report her absence. Employer Exhibit 3. Claimant also had a verbal conversation with her school administrative manager in October 2016 that the employer needed claimant at work. Employer Exhibit 3. Claimant told the employer her attendance was going to improve. Employer Exhibit 3. The school administrative manager warned claimant that her job was in jeopardy.

During claimant's employment, she was absent on: September 12, 2016 because she was sick (claimant did not use AESOP); September 28, 2016 because she was sick (claimant properly reported her absence); September 29, 2016 because she was sick (claimant properly reported, her absence); September 30 because of a personal issue; October 4, 2016 because of an emergency; October 14 because of an emergency (claimant needed unexpected dental surgery); October 17 because of a flat tire (claimant was absent in the morning); October 24, 2016 because of a personal issue; October 25, 2016 because she was sick (claimant properly reported her absence); and October 28, 2016 because she was sick (claimant properly reported her absence). The employer also presented testimony that claimant was a no-call/no-show on October 27, 2016. Claimant testified she worked on October 27, 2016. There was no absence documented for October 27, 2016 on claimant's Absentee Report. Employer Exhibit 5. There was no absence documented for October 27, 2016 in the AESOP – Navigator for claimant. Employer Exhibits 2.

#### **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(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(5) provides:

Discharge for misconduct.

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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*. Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Although claimant was still in her probationary period under the collective bargaining agreement and the employer could separate her for any reason under the collective bargaining agreement, the employer's policy (collective bargaining agreement) is not dispositive of the issue of qualification for unemployment insurance benefits. 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 employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence on October 28, 2016 was related to a properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. 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 November 28, 2016, (reference 02) 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.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs