

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ROBERT E WHITE**  
Claimant

**A & M SERVICES INC**  
Employer

**APPEAL 16A-UI-13285-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/13/16**  
**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 December 5, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 5, 2017. Claimant participated. Employer participated through general manager Ryan Kasperbauer.

**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 wash floor laborer from August 2015, and was separated from employment on November 14, 2016, when he discharged.

Claimant was discharged due to absenteeism and using too many chemicals. The employer has a written policy that states after an employee has three unexcused absences within a year, the employee can be discharged. The employer allows an employee to provide a doctor's note to excuse an absence. Employees are required to call the employer prior to the start of their shift if they are going to be absent. Claimant was aware of the policy.

Claimant had multiple absences in 2016 that the employer considered unexcused. Claimant was absent on February 15 and 29, 2016, due to illness. Claimant properly reported both absences, but he did not provide a doctor's note. Claimant was absent on March 2, 2016, due to illness. Claimant properly reported his absence, but he did not provide a doctor's note.

Claimant was absent on May 3, 9, 19, 24, 25, 26, and 30, 2016, due to illness. Claimant properly reported his absences, but he did not provide a doctor's note. Mr. Kasperbauer testified that claimant had other absences, but the employer considered those absences excused. Claimant was off work the entire month of August 2016, which the employer considered excused due to a work comp claim. On September 5, 2016, claimant provided a doctor's note to the employer with work restrictions due to a work related injury. The employer had light duty available that complied with claimant's work restrictions. Claimant performed light duty for the employer, but he was also absent on September 8, 13, and 22, 2016. Claimant was absent on September 8, 13, and 22, 2016 because he was sick, but he did not provide a doctor's note. Claimant was absent from work on October 6, 2016. Claimant properly reported his absence, but he did not provide a doctor's note. On October 10, 2016, claimant provided a doctor's note to the employer that he could not return to work and he would be reevaluated on October 25, 2016. On October 25, 2016, claimant provided a doctor's note to the employer that precluded him from working and he would be reevaluated in two weeks. On November 8, 2016, claimant provided a doctor's note to the employer that he could return to work on November 14, 2016 with no restrictions. On November 14, 2016, the employer told claimant he was discharged.

The employer gave claimant more than one verbal warning due to his absences, but Mr. Kasperbauer testified he did not have the dates the warnings were given. Claimant was never warned his job was in jeopardy due to absenteeism. Claimant testified he would call the employer to report his absences or provide a doctor's note.

In March 2016, the employer gave claimant a verbal warning for using too many chemicals. Mr. Kasperbauer testified that claimant last used too many chemicals sometime prior to August 1, 2016.

#### **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(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.

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*.

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

Except for claimant's October 6, 2016 absence, Mr. Kasperbauer testified claimant had properly reported all of his absences in 2016 were due to illness/sickness, but the employer considered

these absences unexcused. The employer considered these absences unexcused because claimant did not provide a doctor's note. However, medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. Although claimant properly reported his absence on October 6, 2016, the employer considered unexcused because Mr. Kasperbauer testified claimant did not report the absence was due to illness or injury. Even if claimant failed to report the reason for his absence on October 6, 2016, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Furthermore, a majority of the absences the employer considered unexcused were due to properly reported illnesses, which are not considered unexcused. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

Although Mr. Kasperbauer testified the employer also discharged claimant due to using too many chemicals, the most recent incident of claimant using too many chemicals occurred prior to August 1, 2016, which is not considered a current act. Because the act for which claimant was discharged was not current and claimant may not be disqualified for past acts of misconduct, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**DECISION:**

The December 5, 2016, (reference 01) 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