

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

DORIS M HADA
Claimant

APPEAL NO: 19A-UI-02463-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PILOT TRAVEL CENTERS LLC
Employer

OC: 02/24/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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 March 13, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 23, 2019. The hearing was held jointly with Appeal 19A-UI-02731-JC-T. The claimant participated personally. The employer participated through Tyler Bennett, general manager.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a maintenance person and was separated from employment on February 28, 2019. Continuing work was not available.

The claimant worked for the employer for approximately three months. When she was hired, she was informed that the employer could discharge an employee for having more than three unexcused occurrences in a six month period. The employer could consolidate consecutive absences into one occurrence and expected employees to call four hours before a shift and to speak to a manager if unable to work a shift. The claimant lived 25 miles from work and would

sometimes stay overnight in the motel next to the employer to ensure she could be at work if weather was poor.

The employer attributed the claimant's discharge to the following occurrences:

December 18, 2018	Absence – unknown reason	1 occurrence
January 8, 10, 13, 14, 2019	Absence due to caring for ill family member	1 occurrence
February 18, 2019	Tardy due to weather	1 occurrence
February 25, 2019	Absent due to stomach illness	1 occurrence

The final absence was on February 25, 2019. The claimant notified her manager thirty minutes before her shift, (not four hours in advance), that she would be unable to work due to stomach illness. The claimant spent the evening before throwing up and was planning to go into work but determined she could not. The claimant acknowledged she did not give four hours' notice because she hoped to go into work. When she called in, she spoke to Mr. Bennett and said she figured she'd be fired for the absence. Mr. Bennett acknowledged that if the claimant had not stated she intended to quit, that she still would have been discharged for the call in.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,371.00, since filing a claim with an effective date of February 24, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Ryan Powell, claims analyst for Thomas and Company/Thomas and Thorngren Inc., the employer's unemployment vendor, was called and a voicemail was provided for him. He did not respond. There is no evidence that the employer attempted to submit written participation in lieu of attending the fact-finding interview. Mr. Powell did not attend the hearing to explain why he did not respond to the call or voicemail for the fact-finding interview. The employer witness had no information available about the employer's participation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit, but was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "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.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“rule [2]4.32(7)...accurately states the law”).

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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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 due to properly reported illness are excused, 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 administrative law judge is persuaded that the claimant’s final absence due to illness on February 25, 2019 should be considered excused as well, because even though the claimant only called in thirty minutes before her shift start, she could not have reasonably foreseen she would be unable to attend work sooner. The claimant knew she had stomach issues the evening before but was trying to feel well enough to attend work and tried to make a good faith effort to be at work before she determined she would be unable to work the shift after all. Stomach issues can be unpredictable, as such was the case here. The administrative law judge is persuaded the claimant’s good faith efforts in light of being ill, cannot be ignored in consideration.

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.

The administrative law judge recognizes the strain the claimant's attendance history had on the employer, but the final absence due to unpredictable stomach issues, which was reported prior to shift start, within a reasonable time of when the claimant knew she could not work, is excused. Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the 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.

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. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading to separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The March 13, 2019, (reference 01) decision is affirmed. The claimant is allowed benefits, provided she is otherwise eligible. The issues of overpayment and employer relief of charges are moot.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn