

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**SCOTT G TRAVIS**  
Claimant

**IA DEPT OF HUMAN SERVICES  
/GLENWOOD**  
Employer

**APPEAL 17A-UI-07371-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/18/17**  
**Claimant: Respondent (1)**

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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 July 13, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 8, 2017. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Kenneth Kjer, hearing representative for Employer's Edge LLC. Employer witnesses included Natalie McEwen, human resources, and Kathy King, treatment program administrator. Employer Exhibits 1 through 4 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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 resident treatment worker and was separated from employment on June 19, 2017, when the employer discharged the claimant (Employer Exhibit 2). The employer stated the reason the claimant was discharged was due to taking unauthorized leave from work, and for abandoning his position.

The employer has a policy which requires employees to notify the employer by way of speaking to a supervisor one hour prior to a shift start time, if they are unable to work the shift. The employer reported the claimant was absent 83 shifts between December 2016 and June 19, 2017 due to illness. The claimant was ill on April 27, 2017, worked his shift on April 28, 2017, and was sick on April 29 and 30, 2017. As a result, the employer sent the claimant a letter dated May 1, 2017, informing him that he was out of available time to miss work. His options were stated as to request a medical leave of absence for up to 90 days, apply for a Family and Medical Leave Act (FMLA) leave, or return to work. The claimant did not apply for FMLA but began calling off each shift, giving proper notification of his absence. The employer did not confront the claimant between May 1 and June 9 about his continued absences, or inquire as to why he was not reporting to work, but the claimant had anxiety (Fact-finding worksheet). The employer also stated in communications with the employer, the claimant would reference at times, planning to return to the employer and did not resign.

The claimant continued to call off each day, reporting his absence due to illness through June 12, 2017. At no time between May 1 and June 9, 2017, was the claimant warned he could not continue to call off work without consequence. On June 9, 2017, the employer mailed the claimant a letter (which was inadvertently dated as June 20; see Employer Exhibit 3). The claimant retrieved the letter from the post office on June 13, 2017, and in the letter, it states that if the claimant has not returned to work by June 10, 2017, he will be removed from the payroll (Employer Exhibit 3). The claimant did not receive the letter before June 10, 2017. The claimant discontinued reporting his absences to employer after receiving the letter (Fact-finding statement), and a second letter confirming separation was mailed to the claimant on June 20, 2017 (Employer Exhibit 2).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$894.00, since filing a claim with an effective date of June 18, 2017. The administrative record also establishes that the employer did not participate in the July 12, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal. A voicemail was provided to employer representative, Nicole Maes, claims specialist with Employer Edge LLC. No employer witness contacted IWD to provide a phone number to participate, nor followed up with IWD when an anticipated call for the interview was not received. No written statement in lieu of participation was furnished in advance of the interview. A review of the claims documents which supplemented the notice of protest include the employer's SIDES response, two letters dated June 19 and 20, 2017, and a USPS tracking result screen shot.

## **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.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(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.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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 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”).

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). An employer’s unauthorized leave or absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The claimant had 83 absences related to properly reported illness. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit v. Emp’t Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). The final absence on June 12, 2017, was properly reported and due to illness.

The administrative law judge recognizes the strain the claimant’s attendance history had on the employer, but allowed him to call off each shift for over a month between May 1 and June 12, 2017, reporting he was absent due to illness, without consequence. The claimant’s 83 absences due to illness were properly called off, and attributed due to illness, and therefore excused in the context of this analysis, regardless if he was on approved leave of absence or had adequate sick time to cover the absence. The employer subsequently discharged the claimant after his May 1 through June 12, 2017 absences, all attributed to illness. Therefore, the final absences due to illness and which were properly reported, would be considered excused. The claimant stayed in contact with the employer each day to report his absence, and only discontinued upon receiving a letter that stated his employment would end on June 10, 2017 if he did not report to work. Since the letter was mailed June 9, 2017 and the claimant did not receive it until June 13, 2017, it was reasonable for the claimant to interpret the letter to mean he was discharged and no longer had to report absences.

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. In spite of the expiration of sick time and other available leave period, because the final cumulative absence for which he was discharged was related to properly reported illness or injury and related ongoing medical treatment, no misconduct has been established and no disqualification is imposed. Benefits are allowed, provided claimant is otherwise eligible. 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 for the employer are moot.

**DECISION:**

The July 13, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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