

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROSARIO PEREZ
Claimant

APPEAL NO: 17A-UI-02071-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ISSUES MANAGEMENT INC
Employer

OC: 01/08/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 16, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 17, 2017. The claimant participated in the hearing. Amy Patterson, Human Resources Manager and Angela Chapman, Customer Success Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time customer service representative for Issues Management from April 3, 2016 to January 6, 2017. The claimant worked for the employer through a temporary agency on three previous occasions before being hired as a permanent employee April 3, 2016. He was discharged from employment due to a final incident of absenteeism that occurred on January 2, 2017.

The employer's attendance policy is a no-fault, point-based policy and employees receive a written warning when they accumulate between 6.00 and 8.75 points and receive a final written warning when they accumulate between 9.00 and 11.75 points. A full day absence results in 1.00 point and a second day of a previous day absence results in .50 points. If an employee is absent on a weekend day he receives 2.00 points. If an employee is three minutes to two hours tardy or leaves early by that amount of time he receives .25 points; every two hours of tardiness or leaving early after that results in .25 points. On weekend shifts the point total doubles. Termination occurs when an employee reaches 12 points. Employees can buy back points with PTO, or earn points back through contests or by having perfect attendance for a calendar month. They are also allowed to make up time during the same week they earn points.

The employer receives a lunch and break overage report the first day of every month showing if an employee is tardy returning from lunch or break and points are assigned for those absences. Employees receive a daily report of their lunch and break overages.

On April 28, 2016, the claimant received .50 points for leaving at least four hours early due to illness and was issued a coaching; on May 11, 2016, the claimant received .50 points for leaving at least four hours early because his pregnant fiancé was ill; on May 12, 2016, the claimant received .50 points for leaving at least four hours early because he was ill; on May 13, 2016, the claimant received .50 points for an absence due to illness which was a continuation of his absence the previous day; on May 21, 2016, the claimant received 2.00 points for a personal absence on a weekend workday; on May 25, 2016, the claimant received .50 points for leaving at least four hours early; on June 1, 2016, the lunch and break overage report came out and the claimant received .75 points for being late coming back from lunch and/or breaks; from June 3 through June 19, 2016, the claimant was on paternity leave and received one point; on June 24, 2016, the claimant was allowed to buy back .50 points for a game which took him back to a verbal warning; on July 2, 2016, the claimant received 2.00 points for being absent on a weekend workday; on July 3, 2016, the claimant was absent but did not receive any points because it was a consecutive day out of work; on July 12, 2016, the claimant received .50 points because he was absent two hours and 45 minutes; on July 16, 2016 the claimant received .50 points because he was one hour and 51 minutes late for his weekend shift; on August 1, 2016, the monthly lunch and break overage report came out and the claimant received .25 points; on August 16, 2016, the claimant bought back 1.00 point using eight hours of PTO which took him back to a written warning; the claimant had perfect attendance in August 2016 so he gained .50 points; on September 1, 2016, the lunch and break overage report came out and the claimant received .25 points for an overage; on September 16, 2016, the claimant won a game and earned .25 points back; on September 22, 2016, the claimant received 1.00 point for an absence due to illness which placed him at the written warning level again; on September 23, 2016, the claimant received .50 points for leaving at least four hours early; on September 28, 2016, the claimant bought back 1.00 point by turning in 8.00 hours of PTO which took him back to a written warning; on October 1, 2016, the claimant received a perfect attendance score for September 2016, and his point total was reduced by .50 points; on October 7, 2016, the claimant received .50 points for leaving at least four hours early for personal reasons; on October 10, 2016, the claimant received .50 points for being just over two hours tardy; on October 11, 2016, the claimant's point total was reduced by .25 points because he won a game; on October 13, 2016, he received 1.00 point because he was absent due to the illness of his child; on October 22, 2016, the claimant received 1.00 points for being at least four hours tardy on a weekend; on October 23, 2016, he received 1.50 points for leaving early on a weekend; on November 1, 2016, he received 2.25 points when the lunch and break overage report came out, which put him at 13.50 points but the employer chose not to terminate him but to give him another chance; the claimant had perfect attendance in November 2016 which reduced his point total by .50 points; on December 3, 2016 the claimant received 2.00 points for an absence on a weekend day because his band was playing at the Hard Rock Café and the employer decided not to terminate his employment because he tried to find a replacement to fill in for him; and on January 2, 2017, the lunch and break overage report was issued and the claimant received 1.00 point for a total of 16.00 points. The employer determined there was a pattern of overages on breaks and lunches as the claimant went over six of the nine months he was employed with Issues Management and earned 4.50 points, excluding the 1.25 points when the employer simply coached him.

The claimant received a written warning for attendance June 20, 2016; a written warning for attendance July 5, 2016; a final written warning for attendance August 16, 2016; a final written warning for attendance September 27, 2016; a final written warning for attendance October 17, 2016, and his employment was terminated January 6, 2017.

The employer participated in the fact-finding interview personally through the statements of Human Resources Manager Amy Patterson.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,190.00 for the ten weeks ending March 18, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(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 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

At the time of termination the claimant had accumulated 16 points in just over nine months. The claimant received one point for leaving early twice due to illness and three points for absences due to illness for a total of four of 16 points due to illness. The remaining 12 points the claimant accumulated were due to tardiness, leaving early or taking personal days, some of which occurred on weekend shifts which resulted in double points. Additionally, the claimant received 4.50 points for returning from breaks and lunch late and had points on the monthly break and lunch overage report six of the nine months he was employed with this employer.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits must be denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2,

means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in

the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Human Resources Manager Amy Patterson. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,190.00 for the ten weeks ending March 18, 2017.

DECISION:

The February 16, 2017, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$2,190.00 for the ten weeks ending March 18, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs