

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SHAWN E KUHSE

Claimant

AGRI STAR MEAT & POULTRY LLC

Employer

APPEAL 17A-UI-00874-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/25/16

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 January 17, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 15, 2017. The claimant did not register a phone number with the Appeals Bureau and did not participate. The employer participated through Laura Roney, Payroll/Human Resources Assistant. Employer Exhibit 1 was admitted 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 in shipping and was separated from employment on December 27, 2016, when he was discharged for excessive absenteeism.

The employer has a no fault attendance policy which designates a point value to an employee's absence or attendance infraction (Employer Exhibit 1). Upon the receipt of twelve points in a consecutive twelve month period, an employee is discharged, regardless of the reasons for absences. If an employee presents a doctor's note, it may reduce the number of attendance points for consecutive absences related to the note, but will not eliminate them. The employer's policy also requires employees notify the employer of absences via a designated telephone

number, one hour prior to their shift start time. Failure to properly report an absence does not affect the point value assessed. The claimant was made aware of the employer policies upon hire (Employer Exhibit 1).

The claimant accumulated points for the following absences:

DATE	REASON	POINT VALUE
September 12, 2016	Sick child	1
September 19, 2016	Illness	1
September 22, 2016	Personal injury (toe)	1
September 27, 2016	Left early, reason unknown	½
October 11, 2016	Sick child	1
October 20-23, 2016	Car accident	1
October 30, 2016	No transportation	1
November 1, 2016	Tardy, reason unknown	½
November 4, 2016	Absent, reason unknown	1
November 11, 2016	Left early, sick child	½
November 14, 2016	Sick child	1
November 16, 2016	Sick child	1
December 20, 2016	Sick child	1
December 26, 2016	Illness	1

While the employer's policy states employees are to report their absences one hour prior to shift, the evidence presented is that Mr. Kuhse failed to do so for most occurrences and the employer did not warn the claimant about proper notification or take into consideration his improper notification when disciplining or discharging him. The claimant was issued written warnings on September 30, 2016, November 7, 2016 and November 15, 2016, making him aware his job was in jeopardy. The claimant was discharged for his final absence on December 26, 2016, due to personal illness.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,267.00, since filing a claim with an effective date of December 25, 2016. The administrative record also establishes that the employer did participate in the fact-finding by way of a pre-submitted written statement.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related 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(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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 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 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").

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits, even if the employer was within its rights to impose discipline or even discharge. Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment based on warnings issued on September 30, 2016, November 7, 2016 and

November 15, 2016. The employer did not enforce its proper reporting of absences when addressing any of the absences. At least nine of the fourteen attendance infractions were related to the claimant's own illness or a sick child. In addition, the final absence on December 26, 2016, causing the claimant to "point out" occurred due to his personal illness. Based on the evidence presented, 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 a 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 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 January 17, 2017, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant is not overpaid benefits. The employer's account is relieved of charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs