IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JOEL LONGORIA
Claimant

WINNEBAGO INDUSTRIES
Employer

APPEAL NO: 18A-UI-03060-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/11/18
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 March 2, 2018, 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 30, 2018. The claimant participated in the hearing. Susan Gardner, Human Resources Supervisor, participated in the hearing on behalf of the employer. Employer's Exhibits One through Seven were admitted into evidence.

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 production assembler for Winnebago Industries from August 8, 2016 to February 5, 2018. He was discharged from employment due to a final incident of absenteeism that occurred on February 3, 2018.

Under the employer's attendance policy, which the claimant signed for August 8, 2016, if an employee accumulates 64 hours of absenteeism not covered by an approved leave, he receives a verbal warning in writing; if an employee accumulates 72 hours of absenteeism not covered by an approved leave, he receives a written warning; if an employee accumulates 80 hours of absenteeism not covered by an approved leave, he receives a two day suspension or final written warning; and if an employee accumulates 88 hours of absenteeism not covered by an approved leave, his employment is terminated (Employer's Exhibits One and Two). Being late up to one hour is a tardy and time away of more than one hour is considered a partial absence.

On February 1, 2017, the claimant was absent; on March 22, 2017, he was tardy; on May 3, 2017, he was tardy; on May 12, 2017, he was absent part of the day; on May 15, 2017, he was tardy; on August 23, 2017, he was tardy; on September 21, 2017, he was absent 4.0 hours; on

September 27, 2017, he was absent 1.2 hours; on October 2, 2017, he was absent; on October 6, 2017, he was absent 2.3 hours; on October 9, 2017, he was a no-call/no-show; on October 11, 2017, he was absent 1.7 hours; on October 11, 2017, he was absent 1.7 hours; on October 17, 2017, he was absent; on October 25, 2017, he was absent 1.1 hours; on November 1, 2017, he was absent; on November 9, 2017, he was absent 4.2 hours; on November 16, 2017, he was absent 3.0 hours; on November 21, 2017, he was tardy; on November 29, 2017, he was absent 3.0 hours; on December 4, 2017, he was absent; on January 4, 2018, he was absent; on January 19, 2018, he was absent 3.0 hours; on January 26, 2018, he was absent 3.5 hours; on January 30, 2018, he was absent; and on February 3, 2018, the claimant was a no-call/no-show for mandatory Saturday overtime. The claimant reported for work February 5, 2018, and his supervisor took him to the human resources office. The employer asked him why he was a no-call/no-show February 3, 2018, and the claimant stated his alarm did not go off and he woke up around 9:30 a.m. but did not think about calling the employer or reporting for work. The employer terminated the claimant's employment for exceeding the allowed number of attendance hours as the claimant was over 100 (Employer's Exhibit Seven).

On January 4, 2018, the claimant received a verbal warning in writing for attendance and signed the warning; on January 26, 2018, the claimant received a written warning for attendance and signed the warning; on January 30, 2018, he received a second written warning for attendance and signed the warning after points dropped off his total; also on January 30, 2018, the claimant was told he was on a final notice warning for attendance (Employer's Exhibits Three through Six). The January 30, 2018, warning stated, the claimant was "receiving his Final Notice which means he will not be able to miss any more work, even if hours drop off his time" (Employer's Exhibit Five). The January 30, 2018, final notice warning indicated, "further incidents of absenteeism or tardiness may result in termination" (Employer's Exhibit Six).

The claimant has received unemployment insurance benefits in the amount of $1,556.00 for the four weeks ending March 24, 2018.

The employer personally participated in the fact-finding interview through the statements of Human Resources Generalist Nick Krein.

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 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(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).

The claimant argues the employer is using incorrect dates for his last day worked and final absence. He testified he was a no-call/no-show February 10, 2018, rather than February 3, 2018, and his last day at work was February 12, 2018, rather than February 5, 2018. The claimant did not receive a paycheck February 16, 2018, and that would have covered February 5 through February 9, 2018, which indicates he did not work after Friday, February 2, 2018. Regardless of the dates, however, the claimant agrees he was a no-call/no-show for mandatory Saturday overtime the last Saturday he was scheduled. While he testified he did not know he was required to work overtime that day, he told the human resources manager that his alarm did not go off and when he woke up at 9:30 a.m. he did not think about going to work or calling the employer.

The claimant accumulated 25 incidents of tardiness and absenteeism between February 1, 2017 and February 3, 2018, which included five incidents of tardiness of less than one hour and 11 being tardiness of between one hour and 4.2 hours in duration. He also had eight full day absences, with two no-call/no-shows, including the final absence.

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.

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 Generalist Nick Krein. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $1,556.00 for the four weeks ending March 24, 2018.

DECISION:

The March 2, 2018, 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 employer participated in the fact-finding interview within the meaning of the law. The claimant is overpaid benefits in the amount of $1,556.00 for the four weeks ending March 24, 2018.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn