

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GRAYSON W COOPER
Claimant

EASTERN IOWA TIRE INC
Employer

APPEAL 16A-UI-00053-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/06/15
Claimant: Respondent (2)**

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 December 23, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on January 25, 2016. Although properly notified for the hearing, the claimant did not register a phone number to participate. The employer participated through Ralph Martinez, retail service manager. Employer Exhibits One through Six were admitted into evidence. The administrative law judge also took official notice of the administrative record, including fact-finding documents.

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 an oil change/lube technician and was separated from employment on November 12, 2015, when he was discharged for excessive absenteeism. The employer's policy generally does not permit any absences during an employee's first 90 days of employment, but allowed the claimant to have two absences and retain employment. He received a first written warning for attendance on August 28, 2015 (Employer Exhibit Two). On October 9, 2015, the claimant overslept and was called by his manager, Mr. Martinez, when he did not arrive to work or call to notify he was running late. The claimant also missed work on October 12, 2015, and properly reported his absence by calling Mr. Martinez and informed him he was sick. On October 20, 2015, the claimant was issued a written warning (Employer Exhibit Four) and also the owner met with him to discuss attendance. The final incident occurred on November 12, 2015, when the claimant did not show up to work or call off, but was called by

Mr. Martinez after the start of his shift. The claimant informed Mr. Martinez that he had overslept and would not be in that day. Mr. Martinez reported at the hearing that the claimant may have also referenced his child being sick or needing childcare, but could not recall the specific reasons for the claimant's final absence. He was subsequently discharged (Employer Exhibit Six).

The administrative record reflects that claimant has a weekly benefit amount (WBA) of \$314 but has not received unemployment benefits since filing his claim. The administrative record also establishes that the employer did participate in the fact-finding interview on December 22, 2015, by way of Ralph Martinez.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was 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(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 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).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. In this case, the employer extended the claimant's employment beyond his initial 90 days even though he violated the employer's policy. The claimant was issued two written warnings for his attendance (Employer Exhibits Two and Four) making him aware his job was in jeopardy, in addition to the owner personally meeting with him on October 20, 2015 to discuss attendance.

The final absence was not properly called off when Mr. Martinez called the claimant to inquire why he was not at work on November 12, 2015 after his start time. The claimant stated he overslept and may have also referenced his childcare or child being sick. However, no evidence was presented that regardless of the reason for the absence, the claimant was unable to properly report his absence by calling Mr. Martinez before his start time. In order to be an excused absence, the claimant must properly call off the absence. Therefore, the final absence on November 12, 2015, was not excused, for unemployment purposes.

The employer has credibly 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 unexcused absenteeism, is considered excessive. Benefits are withheld.

Because the claimant has not been paid any benefits, he does not have a potential overpayment. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The December 23, 2015, (reference 01) unemployment insurance 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 not been paid any benefits related to this claim, and therefore the issues of chargeability and overpayment are moot at this time.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs