

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GREGORY J PREVETT**

Claimant

**APPEAL 15A-UI-07713-SC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THUNDER RIDGE BEEF COMPANY INC**

Employer

**OC: 01/11/15**

**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

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 June 26, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it had not provided sufficient evidence to prove the claimant engaged in disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 3, 2015. Claimant Gregory Prevett participated on his own behalf. Employer Thunder Ridge Beef Company, Inc. participated through Chief Operating Officer Keaton Walker and Human Resources Specialist Quint Bartlett. Employer's Exhibits One and Two were received. Official notice was taken of the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 Operator beginning in January 2015, and was separated from employment on June 3, 2015, when he was terminated. The claimant missed work on May 27th, 28th, and 29th of 2015. The employer's policy states if an employee needs to miss work, he or she is to notify his or her supervisor or other "appropriate person" in the department before the start of the shift. (Employer's Exhibit One.) On May 27, 2015, the claimant did not contact his supervisor Chief Operating Officer Keaton Walker. A co-worker texted him that Walker wanted to know why he was missing work and the claimant told him his "throat was swollen shut." Walker left a voice message for the claimant at his phone number, but did not

receive a call back. The claimant did not call or contact anyone working for the employer on the other two days of work that he missed.

On June 1, 2015, the claimant reported to work. Walker planned to speak with the claimant and notify him that his employment had ended, but the claimant left work before 3:00 p.m. when Walker had time to meet with him. The claimant was told by a different supervisor that he would likely be terminated for his three days of missing work without calling.

The following day, the claimant left work after working for an hour and 13 minutes. He submitted his paid time off request to cover the time he would be missing that day. The Office Manager told the claimant and his co-worker, who was the claimant's ride that the two of them should wait to speak with Walker. The co-worker said the paid time off request would be approved and they decided to leave without talking to Walker.

On June 3, 2015, the claimant returned to work and spoke with Walker at 8:30 a.m. Walker told the claimant that he was terminated for attendance. (Employer's Exhibit Two.)

The administrative record reflects that claimant has received unemployment benefits in the amount of \$247.00, since filing a claim with an effective date of January 11, 2015, for the seven weeks after his most recent separation ending August 1, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

#### **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. Benefits are denied

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).

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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

The claimant missed three days at the end of May due to what he claims is illness. The claimant did not properly report these absences as required by the employer's policy. His argument that he was unable to call the employer is not persuasive. While he contends his throat was "swollen shut," he did not seek medical treatment and was able to breathe and swallow. He was not experiencing an emergency as he was able to send a text message to another person in his department. Additionally, his wife could have contacted the employer for him to notify them that he would not be into work. The employer attempted to reach the claimant twice over these three days; however, the claimant failed to return the phone calls. The claimant's absences were not properly reported and therefore unexcused.

After receiving notice that he would likely be terminated for missing the three days, the claimant then left work early on June 1, which appears to have been without permission as Walker had intended to meet with him at 3:00 p.m. On June 2, the claimant again left work without approval and in direct contradiction with the order given by the Office Manager that he should speak with Walker. The claimant's absences were again not excused.

While absences due to illness are generally excused if properly reported, claimant did not apprise employer of the reason for his absences at the end of May and it is considered unexcused, along with the other absences for which no reason was provided to employer. Had the final absence been the only absence or even one of two since the middle of May, it may not have reached an excessive level of absenteeism; but the final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Additionally, the employer attempted to provide a warning to the claimant about his attendance, but was not given that option because the claimant refused to meet with Walker or call him back. The lack of warning, in this case, will not be held against the employer. Given the gravity of the absences and the claimant's deliberate and willful disregard of the attendance policy, the employer has established that the claimant engaged in disqualifying job-related misconduct. Benefits are withheld.

Iowa Code § 96.7 provides, in pertinent part:

7. Recover of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. 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. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated

to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The June 26, 2015, (reference 01) decision is reversed. 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 been overpaid unemployment insurance benefits in the amount of \$247.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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