IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TIMOTHY FUHRMAN
Claimant

IAC IOWA CITY LLC
Employer

APPEAL NO: 16A-UI-10827-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/27/15
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 September 27, 2016, reference 03, 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 October 19, 2016. The claimant did not respond to the hearing and did not participate in the hearing. Erin Pals, Senior Human Resources Staff Associate and Trisha Semelroth, Senior Human Resources Generalist, 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 apprentice tooling mechanic for IAC Iowa City from November 12, 2014 to August 29, 2016. He was discharged for exceeding the allowed number of attendance points.

The employer has a no-fault attendance policy. Employees start with 60 points and lose eight points for a properly reported full day absence and one point for each hour missed due to tardiness or leaving early. If an employee does not call to report an absence more than 30 minutes prior to the start of his shift he receives an additional point. Employees can gain four points for perfect attendance for one month and twice per year receive points based on the amount of overtime worked.

The claimant had 18 points remaining as of January 24, 2016. He received one point January 25, 2016, for leaving early; he received one point February 9, 2016, for tardiness; he received eight points February 11, 2016, for a properly reported full day absence; he gained four points March 31, 2016, for having perfect attendance in March 2016; he received one point April 5, 2016, for tardiness and four points for leaving early; he received two points April 6,

2016, for tardiness; he received one point April 15, 2016, for tardiness; he received two points April 29, 2016, for tardiness; he gained four points June 30, 2016, for perfect attendance and five points for working 100 hours of overtime; and he received one point July 14, 2016, for tardiness.

The claimant's last day worked was July 14, 2016. He was on a medical leave of absence from July 15 to August 1, 2016, at which time he told the employer he was on intermittent FMLA allowing him to be off work four times per month, three days in a row, for six months. The claimant did not provide FMLA paperwork to the employer about his intermittent leave and the last doctor's note the employer received from the claimant stated he could return to work without restrictions August 1, 2016.

The claimant called in and reported he was on FMLA August 1 through August 7, 2016, and the employer did not assess him any attendance points. On August 4, 2016, the employer sent the claimant a letter stating he was no longer approved for FMLA and would begin receiving points August 8, 2016. The employer allowed the claimant 15 days to provide medical documentation for his absence and attached the form for his physician to complete. The claimant called about the due date of August 18, 2016, and the employer extended that date to August 26, 2016. The employer reminded the claimant it wanted to work with him and advised him to call if he had any further issues. The claimant continued to call in as absent due to FMLA and between August 8 and August 26, 2016, he accumulated 110 points. The employer sent him an FMLA denial letter and a certified letter notifying him that his employment was terminated August 29, 2016.

The claimant received a first step warning June 17, 2015, for dropping to 14 points; he received a second step warning August 20, 2015, for dropping to seven points; and a last chance warning December 18, 2015, for dropping to negative four points. At that time the employer gave the claimant 12 last chance points and after subtracting the negative four points the claimant was left with eight points at that time. If an employee drops to zero points or below twice he faces termination of employment.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,724.00 for the four weeks ending October 8, 2016.

The employer's representative, "Yolanda," personally participated in the fact-finding interview on behalf of the employer.

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).

While the claimant called in and stated he was on FMLA from August 1 through August 29, 2016, he was released to return to work without restrictions August 1, 2016, and never provided the employer with additional paperwork indicating he needed additional FMLA. The employer provided him with the required documents for his physician to complete and return and extended the due date for those documents but the claimant never provided the paperwork or contacted the employer again to explain the delay. Finally, the employer felt it had no choice but to start assessing points to the claimant for his absence during the month of August 2016 as he failed to provide the required documentation for FMLA and did not contact the employer. Consequently, the claimant exceeded the allowed number of attendance points.

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 are 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 Yolanda from Talx UCM Services. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $1,724.00 for the four weeks ending October 8, 2016.

DECISION:

The September 27, 2016, reference 03, 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.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/pjs