

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REED WALTON
Claimant

APPEAL NO: 15A-UI-01972-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEERY BROTHERS INC
Employer

OC: 01/11/15
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 2, 2015, 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 16, 2015. The claimant participated in the hearing. Michael Britt, Detail Manager and Jerry Sander, Employer Representative, participated in the hearing on behalf of the employer.

ISSUES:

The issues are whether the employer discharged the claimant for work-connected misconduct and whether the claimant is overpaid benefits.

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 detail helper for Deery Brothers from January 3, 2014 to January 13, 2015. He was discharged for failing to call or show up for work January 6 through January 11, 2015.

The claimant was scheduled to work Tuesday through Friday from 8:30 a.m. to 5:30 p.m. and on Saturday from 9:00 a.m. to 6:00 p.m. The last day he worked was Saturday, January 3, 2015. The claimant was absent Tuesday, January 6 through Saturday, January 10, 2015, and did not call the employer to report his absences. Consequently, the employer believed the claimant abandoned his job.

The claimant came in to work his scheduled shift Tuesday, January 13, 2015. He was directed to meet with Detail Manager Michael Britt and Owner Brad Deery and his employment was terminated at that time. The claimant testified he had a doctor's note excusing his absence for that week and that he placed it on Mr. Britt's desk but Mr. Britt did not receive it.

The claimant received a written warning and two-day suspension because he was a no-call no-show November 15, 2014. The warning stated that the claimant's next unexcused incident of absenteeism or tardiness would result in another suspension or termination.

Employees are required to call the employer at least one hour prior to the start time of their shift and speak to their department manager personally each day they are absent. That policy is stated in the employer's handbook and the claimant was familiar with that policy as he had followed it numerous times when reporting his absences in the past.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,511.00 since his separation from this employer.

The employer did not participate in the fact-finding interview. The employer's representative stated it did not receive notice of the fact-finding interview and that is why it did not participate. The fact-finder did call the employer's representative and left a voice mail, call back number and the employer's appeal rights.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the claimant's absences may well have been due to illness the week of January 6, 2015, he failed to properly notify the employer of his absences on any of those five days he was gone. It is not unreasonable for an employer to require that employees inform it when they are going to be gone for illness or any other reason barring circumstances that prevent the employee from calling in, such as legitimate emergencies. Even if the claimant was sick he still had a responsibility to personally call his department manager and he failed to do so for five consecutive days leading the employer to conclude he had abandoned his job.

The claimant followed the call-in procedure during previous absences due to illness and agrees he was aware of the policy. He had also been warned and suspended following one no-call no-show absence November 15, 2014.

Under these circumstances, the administrative law judge concludes the claimant's conduct in failing to properly report his final five day absence demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). 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 § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

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, there is also not enough evidence to conclude whether the employer failed to participate in the fact-finding interview because it did not receive notice. Consequently, the issue of whether the claimant's overpayment of benefits to date, in the amount of \$1,511.00, can be waived and charged to the employer's account or must be repaid by the claimant is remanded to the Claims Section for a determination.

DECISION:

The February 2, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. 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 issue of whether the employer participated in the fact-finding interview and which party is responsible for the claimant's overpayment is remanded to the Claims Section for determination.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs