

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JERAMIE L TRACY
Claimant

UNIVERSAL TANK & FABRICATION LLC
Employer

APPEAL 19A-UI-03385-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/31/19
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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:

On April 23, 2019, Universal Tank & Fabrication, LLC (employer) filed an appeal from the April 16, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Jeramie L. Tracy was discharged for excessive absences related to illness that were properly reported. The parties were properly notified about the hearing. A telephone hearing was held on May 13, 2019. The claimant participated personally. The employer participated through Human Resources personnel Jen Roling. President Dan Davis was sworn in as a witness for the employer but did not provide any testimony. The Employer's Exhibit 1 was admitted into the record without objection.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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 a Welder beginning on June 2, 2014, and his last day worked was March 22, 2019. The employer's point system related to attendance starts over at the beginning of each calendar year and provides for a three-step discipline procedure. The first step is a written warning, the second step is a warning and three-day suspension, and the third step is discharge. The claimant was on notice of the employer's attendance policy.

The claimant struggled with attendance throughout his employment in 2019. At the beginning of the year, the claimant's shift started at 4:00 a.m. On January 3, the claimant called in after his

start time to report he would be late to work because he slept in. On January 10, the claimant notified the employer after the start of his shift that he would not be at work due to a bad back. On January 11, the claimant missed work and did not notify the employer of his absence. The claimant received a step one written warning for attendance on January 15. He was told there was a problem with his attendance and if it did not improve he would receive a three day unpaid suspension.

The claimant continued to have attendance issues. On January 24, the claimant notified the employer after the start of his shift that he would not be at work and did not provide a reason. After the start of his shift on January 25, the claimant notified the employer that he would not be at work because he was stuck at the casino. On February 5, the claimant notified the employer before the start of his shift that he would be late to work due to transportation issues. The following day the claimant had the same issue and notified the employer prior to the start of his shift he would be late. After the start of his shift on February 13, the claimant notified the employer that he would not be at work due to health issues. On February 21, the claimant notified the employer prior to the start of his shift that he would not be at work because his child was sick. On February 22, before the start of his shift, the claimant reported he would not be at work due to illness.

On March 5, the employer gave the claimant a written warning and suspended him for three days due to his attendance. When he returned, he was placed on probation and told any absences, which were not properly reported and covered by a doctor's excuse, prior to May 1 would result in his discharge. The employer also changed the claimant's start time from 4:00 a.m. to 7:00 a.m. in hopes his attendance would improve. On March 6, the claimant was late to work without notification to the employer because of child care and transportation issues.

On Sunday, March 24, the claimant notified his supervisor he would not be at work the following day because he was going to the doctor for his own personal illness. On March 26, the claimant notified the employer after the start of his shift that he was going to the Emergency Room because he was having difficulty breathing. On March 27, prior to the start of his shift, the claimant notified the employer he was not going to be at work due to illness. However, he could not afford to go to the doctor and get a medical excuse for his absence.

On Thursday, March 28, the claimant did not report to work and did not notify the employer prior to the start of his shift that he would not be there. He did leave a voice message for the employer that afternoon asking when he could set up a time to turn in his toolbox. The claimant left this message because he assumed he had been discharged since he had one more absence that was not excused by a doctor's note during his probationary period.

The claimant did not report to work on March 29 or notify the employer he would be absent. However, the claimant and Plant Manager Derrick DeMoss did have a phone conversation that afternoon. DeMoss did not tell the claimant he was discharged but asked him to report to work on Monday, April 1, at 9:00 a.m. to discuss the situation.

The morning of April 1, the claimant did not report for the meeting at 9:00 and called the employer at 10:00 to explain he would not be able to report until 1:00. The claimant did not arrive for the meeting until 1:30 p.m. due to childcare issues. At that time, DeMoss told the claimant that it was best they part ways and asked the claimant to return his company property.

The administrative record reflects that the claimant has received unemployment benefits in the amount of \$2,425.00, since filing a claim with an effective date of March 31, 2019, for the five

weeks ending May 11. The administrative record also establishes that the employer participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged for job-related misconduct. Benefits are denied.

Iowa Code section 96.5 provides, in relevant part:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

...

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. 871-24.25 provides, in relevant part:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

...

(33) The claimant left because such claimant felt that the job performance was not to the satisfaction of the employer; provided, the employer had not requested the claimant to leave and continued work was available.

Iowa Admin. Code r. 871-24.32 provides, in relevant part:

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.

...

(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.

This definition of misconduct 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 unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The employer has not established that the claimant voluntarily quit the employment. The employer could not definitively state there was continuing work available to the claimant after March 28, when he first expressed intent to leave employment. If there was no continuing work available to the claimant, then he was unable to make a voluntary choice to leave the employment. As the employer has not established a voluntary quit, the case will be analyzed as a discharge.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to

substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. 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.

Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. In this case, the claimant had sixteen absences from January 1 through March 29. Of those sixteen absences only two, February 22 and March 25, were excused because the claimant notified the employer prior to the start of his shift that he would be absent and the absences were related to illness or for other reasonable grounds.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence on April 1 was not excused. The claimant arrived late for the meeting due to child care issues and did not give the employer proper notice he would be late. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code section 96.3(7) as amended in 2008, provides in relevant:

Payment – determination – duration – child support intercept.

7. Recovery 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.

Iowa Admin. Code r. 871-24.10(1) 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 un rebutted 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.

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. Iowa Code § 96.3(7). 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. Iowa Admin. Code r. 871-24.10(1). 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), Iowa Admin. Code r. 871-24.10.

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 April 16, 2019, 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 been overpaid unemployment insurance benefits in the amount of \$2,425.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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