

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

YATES P EDWARDS
Claimant

CEDAR INVESTMENT GROUP LLC
Employer

APPEAL 20A-UI-11409-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/21/20
Claimant: Respondent (5)

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
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

The employer/appellant, Cedar Investment Group LLC., filed an appeal from the September 10, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was scheduled for November 9, 2020. The hearing was postponed before testimony was taken to allow parties to receive and review proposed exhibits.

After proper notice, a telephone hearing was held on December 16, 2020. The claimant, Yates P. Edwards, participated personally and was represented by T. Ivan Kling, attorney at law. The employer participated through Kaylee Dostal, human resources. Dustin Bernacki also testified.

The administrative law judge took official notice of the administrative records. Employer Exhibits 1-20 and Claimant Exhibits A-D were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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?
Is the claimant eligible for Federal Pandemic Unemployment Compensation?

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 sales manager beginning November 4, 2019 and was separated from employment for being a no call/no show on June 22, 2020.

Claimant was trained on employer rules and procedures at the time of hire, and had access to the company handbook. Employer has a written attendance policy, which includes an employee is subject to discharge for a single no call/no show (Employer Exhibit 15). Employer expected claimant to notify management prior to the start of his 7:00 a.m. shift if he was unable to work.

According to employer, claimant had absences and tardiness, in the past but was not issued any written discipline. Just prior to claimant's last day worked, employer had eliminated his \$25,000 annual base pay and moved him to commission only, which reduced his June 12, 2020 paycheck by almost 75%, but did not issue corrective action or a performance improvement plan. Employer stated the reduction was in response to claimant's performance.

Claimant last worked on June 16, 2020. On June 17, 2020, claimant was off work, with prior approval. Claimant called off sick June 18 and 19, 2020, and properly notified the employer. Claimant was not scheduled on June 20 and 21, 2020.

Claimant did not report to work on June 22, 2020, either in person, or remotely. Employer attempted to call claimant on his work issued phone and it went to voicemail. Employer tried to contact claimant's emergency contacts, and verified his computer had not been turned on. After five hours of trying to reach claimant, employer sent law enforcement to do a welfare check. Claimant was asleep. Claimant said his work phone was out of battery and he had no charger. Claimant had not turned on his computer prior to law enforcement's visit. At 12:57 p.m., he sent an email apologizing for the no call/no show saying he was "still sick" and also expressing his concerns about the employer's change in pay structure (Employer Exhibit 13). He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,833.00, since filing a claim with an effective date of June 21, 2020. The claimant also received federal unemployment insurance benefits through Federal Pandemic Unemployment Compensation (FPUC). Claimant received \$3,000.00 in federal benefits.

The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged but not for disqualifying job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“rule [2]4.32(7)...accurately states the law”).

It cannot be ignored that the claimant’s “illness” on June 18 and 19, 2020 coincided with learning his pay had been reduced significantly without warning. Though claimant reported he was sick with the “same issues” on June 22, 2020, he also composed a lengthy two paragraphs about his unhappiness with the pay cut, after his work phone wasn’t charged and he hadn’t previously logged on to his computer. However, the employer did not discharge claimant for his unsatisfactory work performance or truthfulness of his absences, it discharged him based upon the no call/no show on June 22, 2020 per its “one no call/no show” policy (Employer Exhibit 15).

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).

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

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. The undisputed evidence is claimant was absent and late to work before June 16, 2020 but not disciplined or told his job was in jeopardy. Claimant properly reported his absences due to illness on June 18 and 19, 2020, and was a no call/no show on June 22, 2020, which led to discharge.

Although claimant was absent on June 22, 2020 without reporting such to the employer, and that absence would generally be considered unexcused, since the employer had not previously warned claimant about its specific expectations about reporting, frequency of absences, or arranging absences in advance, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee might even infer employer acquiescence after multiple unreported absences without warning or counseling. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot.

The final issue to address is whether the claimant is eligible for Federal Pandemic Unemployment Compensation (FPUC).

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled,

the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Because the claimant is allowed regular unemployment insurance benefits, he is also eligible for FPUC, provided he is otherwise eligible. The employer is not charged for these federal benefits.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The September 10, 2020, (reference 01) unemployment insurance decision is modified with no change in effect. Claimant did not quit the employment. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. He is not overpaid benefits. The employer's account cannot be relieved of charges associated with the claim for regular unemployment insurance benefits. The claimant is also eligible for FPUC, provided he is otherwise eligible.



Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

December 28, 2020
Decision Dated and Mailed

jlb/scn