

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS R BROWN
Claimant

APPEAL NO. 16A-UI-09617-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IAC IOWA CITY LLC
Employer

OC: 12/20/15
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

IAC Iowa City LLC, the employer, filed a timely appeal from a representative's decision dated August 26, 2016, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on September 21, 2016. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Ms. Trisha Semebroth, Senior Human Resource Generalist, and Mr. Jeff Seaton. Employer's Exhibits A through E were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Nicholas Brown was employed by IAC Iowa City LLC from February 18, 2011 until August 12, 2016 when he was discharged for exceeding the permissible number of attendance infractions allowed under the company's attendance policy. Mr. Brown was employed as a full-time injection worker and was paid by the hour. His immediate supervisor was Mr. Jeff Seaton.

Mr. Brown was discharged after he had exceeded the permissible number of attendance infractions allowed under the company's "no fault" attendance policy.

Under the terms of the policy employees are given 60 attendance points and points are deducted for absences, tardies, leaving early, and failure to notify the employer. Employees are assessed one point for each hour up to eight points per day and the deduction for tardiness is similarly prorated based upon the amount of time missed by the employee. Failure to notify the employer of any impending absence or tardiness results in an additional point assessment.

Failure to report for scheduled overtime results in the assessment of point deductions in the same way as regularly scheduled hours.

If an employee's point total drops 30 points they are given a written notice. If an employee's points drop to 10 points or below, they are given a second written notice. When an employee's points drop to 0 they are placed on probation and enter a Last Chance Agreement with the company to remain employed and are given 12 additional Last Chance points.

Employees are able to earn four extra points for each calendar month that they have perfect attendance and punctuality and are able to add one extra attendance point for every 20 hours of overtime that they work. Employees are subject to discharge if they use all attendance points after receiving the 12 Last Chance points. During the time that the company's attendance policy had been implemented, Mr. Brown had often been absent, reported to work late and at times had failed to report without providing notification to the employer. Mr. Brown was discharged after he had exhausted all attendance points available to him when he failed to report for mandatory overtime on August 2, 2016 although claimant had worked mandatory overtime the preceding day and was aware that he was expected to do so on August 2, 2016. He reported to work four hours late without calling in. Mr. Brown attributed his lack of punctuality to "oversleeping." Claimant was discharged on August 12, 2016 following an audit of his attendance point balance. Claimant was aware of company policy and had been previously warned his attendance was unsatisfactory and could result in his termination from employment.

REASONING AND CONCLUSIONS OF LAW:

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is a form of job misconduct. The Court held the absences must both be excessive and unexcused and the concept includes tardiness, leaving early, etc. The Court further held that absences due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984), the Court held that absences due to matters of "personal responsibility" such as transportation problems or oversleeping are considered unexcused.

In the case at hand, the evidence in the record establishes that Mr. Brown's attendance infractions were excessive and unexcused and that the claimant had been properly warned prior to being discharged. Mr. Brown knew or should have known that he was scheduled for mandatory overtime on August 2, 2016 and that he was expected to report for the mandatory overtime at the time set by the employer. Although aware of the employer's expectations, Mr. Brown did not report until a number of hours after the overtime began and had not called in to inform the employer that he would be late. Mr. Brown admitted at that time that his tardiness was due to "oversleeping."

Upon application of the facts to the law, the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's job separation took place under disqualifying conditions. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,682.00 for the weeks ending August 20, 2016 through the week ending September 24, 2016. The administrative

record also establishes that the employer did not participate in the fact-finding interview or make a firsthand witness available for rebuttal.

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 claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

DECISION:

The representative's decision dated August 26, 2016, reference 02, is reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,682.00. Claimant is not obligated to repay that amount. The employer's account is chargeable for the overpayment because the employer did not participate in the fact-finding interview.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs