

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERAD L HAYES
Claimant

APPEAL NO. 09A-UI-08658-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

VAN DIEST SUPPLY CO
Employer

OC: 04-26-09
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 10, 2009, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on July 2, 2009. The claimant did participate. The employer did participate through (representative) Carolyn Cross, Personal Manager and Mark Davis, Director of Manufacturing. Employer's Exhibit One was received.

ISSUES:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a production operator full time beginning March 11, 2008 through April 22, 2009 when he was discharged.

On April 3 the claimant went to his employer and asked for time off to seek treatment for alcoholism. The employer told the claimant that he had to have Family Medical Leave Act (FMLA) approval for the time off since he was out of leave time. The claimant was given the paperwork to supply to his medical providers to fill out. The claimant was in detox treatment from April 3 through April 8. After that time none of his medical providers believed that he needed to be off work and would not fill out the paperwork for him to be off work. The claimant did not return to work despite his medical provider's opinion that he could do so.

On April 13 the employer contacted the claimant to again remind him that he needed to get the FMLA paperwork turned in to cover his absences. Ms. Cross spoke to the claimant's counselor, Mary Berry, on April 13 and was told by Ms. Berry that the claimant could work and that she would not fill out FMLA paperwork to keep him off work.

The claimant spoke to Mr. Davis on April 14 and told him that his physician would not cover his absences from work. During that conversation the claimant indicated that he knew his job was in jeopardy due to his attendance points. No physician took the claimant off work after April 8, 2009. The claimant knew when he asked for time off on April 3 that he had to have it covered by FMLA as he did not have any leave time left. According to the claimant's medical providers he was capable of working, but chose not to.

Claimant has received unemployment benefits since filing a claim with an effective date of April 26, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

871 IAC 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).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. 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 claimant could have worked according to his medical providers but chose not to do so. Thus, his absences after April 8 cannot be excused as either due to illness or being covered by FMLA. The final absences, in combination with the claimant's history of unexcused absenteeism, are considered excessive. Benefits are withheld.

Iowa Code § 96.3-7, as amended in 2008, provides:

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) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant 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. 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. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The June 10, 2009, reference 02, 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. Claimant is overpaid benefits in the amount of \$2808.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css