

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRYAN JAMES
Claimant

APPEAL NO: 16A-UI-09024-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WHIRLPOOL CORPORATION
Employer

OC: 07/24/16
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 8, 2016, 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 September 7, 2016. The claimant participated in the hearing with witness/current assembler for the employer, Donte Powell. Eric McGarvey, Human Resources Generalist, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

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 assembler for Whirlpool Corporation from October 6, 2015 to June 29, 2016. He was discharged from employment due to a final incident of absenteeism that occurred on June 24, 2016.

The employer's attendance policy, contained in the union contract, states that multiple attendance infractions will result in termination of employment. The policy and contract provide that the employee receive at least two written warnings before being discharged for attendance.

The claimant was tardy October 14 and October 15, 2015; he was absent October 16, 2015; he was absent October 20, 2015; he was tardy October 21, 2015; he was absent November 16, 2015; he was tardy November 19, December 11 and December 14, 2015; he was absent December 16, 2015; he was tardy December 28, 2015 and January 13, 2016; he left early January 19, 2016; he was tardy January 25, 2016; he was absent January 26, 2016; he was tardy February 2 and February 4, 2016; he was absent February 5, 2016; he left early February 11, 2016; he was a no-call no-show February 12, 2016; he was absent February 15, February 17, February 19 and February 22, 2016; he was tardy March 9, 2016; he was absent

March 11, 2016; he was tardy March 14, 2016; he was absent March 18 and March 28, 2016; he was tardy April 12 and April 22, 2016, he was a no-call no-show April 25, 2016; he was absent May 2, 2016; he was a no-call no-show May 3, 2016; he was tardy May 12 and May 17, 2016; he left early May 21, 2016, he was absent May 24 and May 31, 2016; he was tardy June 6 and June 16, 2016; he was absent June 18, 2016; he was tardy June 24, 2016; and left early June 27, 2016.

The claimant received a first written warning January 8, 2016; a second written warning February 23, 2016 and a final written warning May 4, 2016. He signed each of those warnings. The employer is required to issue an employee two written warnings prior to termination but has the option of allowing three written warnings before termination occurs.

The claimant argued that the dates where he was shown leaving early were the result of problems with the machines and he and other employees were actually sent home on those occasions.

There is no evidence that these absences were related to illness.

The claimant has received unemployment insurance benefits in the amount of \$1,196.00 for the four weeks ending August 20, 2016.

The employer did not participate in the fact-finding interview.

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.

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).

The claimant accumulated 20 incidents of full-day absenteeism, 20 incidents of tardiness, and four incidents of leaving early between October 14, 2015 and June 27, 2016. The claimant argued that the dates he left early occurred because he and other employees were sent home due to the line being down or something else of that nature. The employer did not disagree with the claimant's testimony regarding leaving early so the administrative law judge will not consider the four dates the claimant was deemed to have left early in making a determination of excessive absenteeism.

Without counting the dates the claimant left early, he still was tardy or absent on 40 occasions during his nine month tenure with the employer and there is no evidence the claimant's absences were due to properly reported illness. That is a completely unacceptable attendance record. The employer was very lenient with the claimant regarding his attendance and issued him three written warnings rather than the standard two written warnings prior to discharging him, but finally could no longer tolerate his poor attendance and terminated the claimant's employment.

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 final absence, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits are 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 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.

(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 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.

The claimant did not receive benefits due to fraud or misrepresentation to the Department and there is no evidence the employer participated in the fact-finding interview. Because the employer failed to participate in the fact-finding interview, the claimant's overpayment of benefits, in the amount of \$1,196.00 for the four weeks ending August 20, 2016, does not have to be repaid by the claimant and the employer's account remains subject to charge for those benefits.

DECISION:

The August 8, 2016, reference 01, 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's overpayment is waived as to the claimant and the employer's account remains subject to charge for the benefits the claimant has received to date in the amount of \$1,196.00 for the four weeks ending August 20, 2016.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs