

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 detailer for Clemons from June 7, 2004 to August 5, 2005. He was discharged from employment due to insubordination and excessive unexcused absenteeism. On August 4, 2005, the claimant was scheduled to work from 11:00 a.m. to 8:00 p.m. He called his supervisor at home at 7:30 a.m. and asked if he could take an early lunch to take his daughter to a doctor's appointment. His supervisor agreed that the claimant could take lunch at 1:00 p.m. instead of 3:00 p.m. The claimant called in around 3:00 p.m. and told the sales manager he had a doctor's appointment for his daughter and would not be back at work. The sales manager told the claimant he needed to speak with his supervisor and paged the supervisor. The claimant hung up the phone before speaking with his supervisor. The employer had to pay another employee overtime to cover the claimant's hours. The discharge occurred after a final incident of absenteeism when he was a no-call no-show August 5, 2005. The claimant had arranged to take vacation from August 6, 2005 through August 13, 2005, even though he did not have enough vacation to cover these days. Approximately one week before his separation, the claimant told a co-worker that he would not be in on August 5, 2005, because he had to pack to go on vacation the following day. The co-worker asked the claimant if he had asked the supervisor for the day off and the claimant indicated he had not. The co-worker suggested the claimant talk to the supervisor but the claimant chose not to do so. On August 5, 2005, the employer called the claimant three times before speaking to him. The employer told the claimant he was discharged for excessive absenteeism and the claimant hung up without explanation. The claimant had a history of excessive absenteeism and had 26 unexcused absences in 2004. He had unexcused absences January 6, March 10, and April 21, 2005. The claimant failed to return to work after lunch June 9, 2005. He was absent four times in 2005 to attend court and five times due to his child being sick.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

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 section 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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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). The claimant knew he would not be returning to work August 4, 2005, and would not be reporting to work on August 5, 2005, but did not have authorization to take time off work. He knew or should have known his job was in jeopardy and his refusal to discuss his absences with his supervisor are considered insubordination. The final absences, in combination with the claimant's history of absenteeism, are considered excessive. Benefits are withheld.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The September 15, 2005, reference 03, decision is reversed. The claimant was discharged from employment due to job-related misconduct. 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 is overpaid benefits in the amount of \$1,709.00.

je/pjs