

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

METHUSELAH K GEE
Claimant

APPEAL NO: 17A-UI-12161-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 11/05/17
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 November 17, 2017, 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 December 18, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Jerri Ferrell, General Manager, 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 sales manager for Kum & Go from May 8, 2017 to November 13, 2017. He was discharged from employment due to a final incident of absenteeism that occurred on November 4, 2017.

Since the time of hire in May 2017, the claimant notified the employer he would be late approximately two to three times per week. On August 1, 2017, the claimant did not call or show up for his 2:00 p.m. shift. The employer called him and he stated his wife was in the emergency room and he forgot to call to report he would be absent. On September 1, 2017, the employer talked to the claimant about calling in 15 minutes before the start of his shift, as he had been doing, rather than the required two hours prior to his shift. On September 5, 2017, the employer spoke to the claimant about its expectations for his attendance. On September 9, 2017, the claimant was a no-call/no-show. On September 10, 2017, the claimant messaged the employer and said he was hurt while playing soccer and did not have his phone September 9, 2017. The employer told him to report for his 2:00 p.m. shift 30 minutes early September 12, 2017, so they could discuss the employer's expectations. On September 12, 2017, the employer told the claimant he needed to find a way to contact the employer in the

future. On September 15, 2017, the claimant called at 1:45 p.m. for his 2:00 p.m. shift and said his wife was causing problems and he would not be in. The employer told the claimant he needed to come in regardless of whether his wife was causing problems and the claimant arrived at 4:30 p.m. At the beginning of November 2017, the employer decided to temporarily try the claimant at a different store location hoping that his attendance issues were related to his environment. On November 2, 2017, the employer received a message from the claimant asking if he lost his job because he called in sick. The employer told him his job was not in jeopardy for calling in but rather because he called in 20 minutes before the start of his shift. The employer told the claimant she was waiting to hear from her manager and would let him know about the status of his job but that it might be the following day before she heard anything. The claimant did not call the employer or show up for work November 3 or November 4, 2017. On November 6, 2017, the employer's manager notified her he was going to talk to the claimant and the other general manager. He then contacted the employer and stated the claimant had not been at work since speaking to the employer November 2, 2017. The employer waited until November 13, 2017, hoping the claimant would contact her but he was a no-call/no-show for his shifts that week as well and the employer terminated his employment November 13, 2017. There is no evidence that these absences were related to illness.

The claimant has claimed and received unemployment insurance benefits in the amount of \$900.00 for the two weeks ending December 2, 2017.

The employer personally participated in the fact-finding interview through the statements of General Manager Jerri Ferrell.

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 section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 had a poor attendance record during his tenure with this employer and refused to comply with its policy requiring employees to call two hours prior to the start time of their shift if they are going to be absent. The claimant contacted the employer November 2, 2017, to ask about the status of his job and the employer stated it would let him know but it might be the following day before it had an answer. The employer's supervisor was not available November 3, 2017, and consequently did not attempt to meet with the claimant until Monday, November 6, 2017, at which time it learned the claimant had not reported for work or called to report he would be absent since November 2, 2017. While there may have been a misunderstanding about whether the claimant should report for work while he was waiting to hear from the employer about the status of his employment, the claimant had a responsibility to contact the employer when he did not hear from it November 3, 2017, to at least inquire as to whether he was expected to be at work during that time. Instead, the claimant did not call or report for work and never contacted the employer again. As a management employee, the claimant had a higher duty to maintain contact with the employer during that time period, even if the employer should have made its expectations clear with regard to whether he needed to report to work while waiting to hear about the status of his job.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence November 2, 2017, was not excused because it was not properly reported. 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.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of General Manager Jerri Ferrell. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$900.00 for the two weeks ending December 2, 2017.

DECISION:

The November 17, 2017, 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn