

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEMEISO D MARSHALL
Claimant

APPEAL NO. 13A-UI-05245-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CNH AMERICA LLC
Employer

OC: 12/23/12
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 April 25, 2013, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on June 6, 2013. The claimant did participate. The employer did participate through Rachel Taber, Labor Relations Manager and Josh Lambert, Supervisor. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a production machine operator full time beginning October 22, 2012 through March 25, 2013 when he was discharged. The claimant was hired a supplemental employee and under the employer's policies, copies of which were given to the claimant, and explained to him, he was not entitled to all of the disciplinary steps afford a regular employee or to some benefits afforded regular employees. The claimant's absences that were counted against him include: November 22, 23, 2012; January 21, 28, 2013; February 25, March 18, 19, 20, 21 and 22. The time the claimant missed due to his brother's death and his ill child, and when he had specifically sought and obtained permission to miss work to handle his legal issues was not counted against him in the decision to discharge. Under the employer's policy, supplemental employees are not allowed to have any unexcused absences at all.

The claimant knew in late 2012 that he had to serve two days jail time. He missed work on March 18, 19 and 20. On March 20 he went to the human resources department to speak to Ms. Tabor. He told her he had missed work due to legal issues. The administrative law judge does not believe that the claimant had to spend an entire week meeting with his attorney. The claimant specifically asked Ms. Tabor if he could be off work on March 21, and 22 so that he could serve a two day jail sentence. The claimant specifically represented to Ms. Tabor that he

would be in jail both of those days and unable to work. Ms. Tabor contacted the claimant's supervisor Mr. Lambert to get his permission to give the claimant those two days off work and to get permission from the supervisor to even continue the claimant's employment. The employer had made many accommodations prior to March 20 to give the claimant time off to deal with his legal issues and his legal issues surrounding his children. An employer is not required to consider any absence due to a meeting with an attorney or to attend a court proceeding as excused. None of claimant's absences were due to a requirement that he serve on a jury.

The claimant did not report for work on either March 21 or March 22. When he reported for work the following Monday March 25, he told the employer he would need time off to serve his jail sentence on March 27 and 28. The claimant had not served his jail sentence on March 21 or 22 and had not called the employer to tell them of the switch nor had he reported to work. The employer discharged the claimant for failing to work on March 21 and March 22 when he should have been able to. The administrative law judge does not believe that the claimant needed to meet with his attorneys on both of those days as he thought he would be in jail both of those days. When the claimant met with Ms. Tabor on March 20 she made it clear to him that any additional unexcused absences would lead to his discharge. The claimant should have known that he was close to discharge as Ms. Tabor had to consult with his supervisor to see if he would even be kept on as an employee because of his unexcused absences on March 18, 19 and 20. The claimant had been given a verbal warning on March 2.

Prior to his discharge the claimant had demonstrated an ability to properly follow attendance policies by calling in to report his absence and by requesting from his supervisor time off prior to missing work.

The claimant has received unemployment benefits after the separation on a claim with an effective date of December 23, 2012.

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(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’s absences for March 21 and 22 are not excused as he was given time off only to serve a jail sentence which he did not do. None of the claimant’s absences to deal with his own legal issues were excused nor required to be excused by the employer.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to 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 final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code section 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.

DECISION:

The April 25, 2013 (reference 03) 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.

REMAND: The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/tlll