

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

WADE G NELSON

Claimant

APPEAL 15A-UI-13477-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CORY JUERGENS CONSTRUCTION LLC

Employer

OC: 11/08/15

Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the December 2, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 30, 2015. Although properly notified for the hearing, the claimant did not register a phone number for himself or representative to participate. The employer participated through Cory Juergens, Owner. The administrative law judge took official notice of the administrative record, including fact-finding documents. Employer Exhibit 1 was admitted into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a general laborer and was separated from employment on November 12, 2015, when he was discharged for excessive absenteeism.

The employer does not have a written policy regarding its attendance but verbally communicated to the claimant that he was expected to call Cory Juergens at least thirty minutes prior to his shift if he was going to be absent. The employer also accepted text messages as properly reported absences. The employer asserted at the hearing that the claimant's absences placed a burden on fellow co-workers who would have to pick up his work if he was absent.

The claimant was issued a verbal warning on October 24, 2015 for his attendance in response to four recent absences. On September 11, 2015, he text messaged Mr. Juergens to notify of his absence for the following day due to him still being up and partying at 2:00 a.m. On October 7, 2015, he called off work to go see his therapist. On October 11, 2015, he did not show up to a volunteered shift after getting in a bar fight, and on October 17, 2015, the employer learned he worked under the influence of alcohol. After the October 24, 2015 warning, the claimant was late on October 30, 2015 due to oversleeping, and called off on November 1, 2015, due to his girlfriend surprising him with a visit. On November 10, 2015, the claimant text messaged Mr. Juergens prior to his shift stating he was not going to be in due to a sore back. The claimant did not elaborate in the text message nor did Mr. Juergens inquire. When Mr. Juergens visited the claimant on November 12, 2015 to fire him, the claimant did produce a doctor's note showing he had been at the chiropractor on November 10, 2015.

The administrative record reflects that claimant has received unemployment benefits in the total amount of \$642.00, since filing a claim with an effective date of November 8, 2015, through the week of December 4, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview on December 1, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 Code § 96.5(2)b and c provide:

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:
 - b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.
 - c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. In this case, the claimant's final absence was due to his back being sore. This was confirmed by a doctor's note to the chiropractor, and the employer deemed the claimant's final call off to be properly reported. Cognizant of the impact that the claimant's absences had and the burden it placed on the employer's staffing, the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The December 2, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits, and the employer's account is not relieved of charges associated with this claim.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/css