

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AARON MESSERSCHMIDT
Claimant

APPEAL NO. 13A-UI-14113-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BUILDING PRODUCTS INC OF IOWA
Employer

OC: 11/17/13
Claimant: Respondent (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Building Products Inc. of Iowa (employer) appealed an unemployment insurance decision dated December 13, 2013, reference 01, which held that Aaron Messerschmidt (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 16, 2014. The claimant participated in the hearing. The employer participated through Debbie Hammargren, Human Resources Manager.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time warehouse stager from April 19, 2010 through November 15, 2013 when he was discharged for excessive absenteeism. The final incident occurred on November 14, 2013 when he failed to return to work after picking up his sick child from school. The employer said the claimant's shift was from 8:45 a.m. to 5:30 p.m. The claimant said he worked 8:00 a.m. to 5:00 p.m. but worked beyond that when necessary.

The employer issued him verbal warnings for attendance on August 21, 2013 and September 10, 2013. The general manager told him on September 10, 2013 that he would be terminated if he missed work again. The claimant was late on September 12, 2013 and the employer gave him another chance but issued him a written warning.

The claimant had to leave work on November 14, 2013 to pick up his 13-year-old child from school because he was sick. He left work at approximately 1:30 p.m. and before he left, Human Resources Manager Debbie Hammargren asked him about returning to work but the claimant

did not respond. Ms. Hammargren subsequently called the claimant to ask him about returning to work but he did not answer his phone. She left a voice mail and also sent him a text message that he needed to return to work. The claimant lives 30 to 40 minutes away from work and he picked up his son and took his son to the child's mother's house. He did not return to work and did not return the call to the employer until approximately 4:00 p.m. The claimant said he had not received her earlier message but that it was too late to return to work at that time.

The claimant filed a claim for unemployment insurance benefits effective November 17, 2013 and has received benefits after the separation from employment in the amount of \$2,528.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on November 15, 2013 for 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. 871 IAC 24.32(7).

The Iowa Supreme Court in the case of *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct and includes tardiness, leaving early, etc. The Court in the case of *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of "personal responsibility such as transportation problems and oversleeping are considered to be unexcused."

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 claimant could not offer a reasonable explanation as to why he failed to return to work on November 14, 2013. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits he has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, a waiver cannot be considered because both parties participated in the fact-finding interview. See 871 IAC 24.10. The employer's account is not subject to charge and the claimant is responsible for repaying the overpayment amount of \$2,528.00.

DECISION:

The unemployment insurance decision dated December 13, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until 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 \$2,528.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs