

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**WILLIAM E FRANTZ**  
Claimant

**RIVERBEND HOLDINGS LLC**  
Employer

**APPEAL 17A-UI-01784-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/27/16  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
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 February 10, 2017, (reference 04) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 8, 2017. The claimant did not participate. The employer participated through owner Kevin Brown. Official notice was taken of the administrative record.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can 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: Claimant was employed full time as a mechanic from July 6, 2015, until this employment ended on November 30, 2016, when he was discharged.

The employer has a points based attendance policy in place. Employees are given a half point for each tardy and a full point for each absence. Once an employee reaches five points a verbal warning is issued. Employees are given another warning and a suspension after reaching six points and are terminated at seven points. A copy of the policy, located in the employee handbook, was given to claimant on July 12, 2015.

Between January 1 and November 30, 2016, claimant was tardy to work 20 times, primarily due to oversleeping. On August 5, 2016, claimant was issued a warning for his attendance, following a tardy and a no-call/no-show. This warning advised claimant that if he had any additional attendance violations his employment would be terminated. Claimant was given several verbal warnings about his attendance prior to this. Claimant was issued another written

warning for his attendance on August 12, 2016. This warning also advised claimant that further infractions would result in termination. Claimant was tardy to work ten more times between August 12 and the date of his termination.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 27, 2016. The claimant filed for and received a total of \$5,695.00 in unemployment insurance benefits for the weeks between November 27, 2016 and February 25, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on February 9, 2017. The fact finder determined claimant qualified for benefits.

## **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 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Here, employer has established that claimant had poor attendance throughout his employment. Although employer had a policy stating employees could be terminated after receiving seven attendance points, employer did not follow its own policy. Employer gave claimant several verbal warnings, two written warnings, and allowed him to be tardy ten more times before it finally terminated him. Claimant was habitually late throughout his employment. Employer acquiesced in his poor attendance. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has

no reasonable way of knowing that there are changes that need be made in order to preserve the employment.

If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Here, employer gave claimant that warning and but did not followed through on it. Employer allowed claimant to continue being tardy with no repercussions. Claimant was allowed to be tardy to work an additional ten times after being advised twice that further violations would lead to termination and before actually being terminated. Thus, claimant reasonably believed his conduct was acceptable to employer. Inasmuch as employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. Because claimant is qualified to receive benefits, the issues regarding overpayment are moot and will not be discussed further.

**DECISION:**

The February 10, 2017, (reference 04) unemployment insurance decision is affirmed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The issues of overpayment and participation are moot.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

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