

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRAD E WILLIAMSON

Claimant

BLACKHAWK SERVICES CORP

Employer

APPEAL 22A-UI-01480-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/28/21

Claimant: Respondent (2)

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/appellant filed an appeal from the December 13, 2021 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits based upon claimant's discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on February 8, 2022. The claimant did not participate. The employer participated through witnesses Patty Cranston and Laurey Gray. Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

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: Claimant was employed full-time as a production foreman. His employment began on March 30, 2020 and ended on November 16, 2021 when he was discharged from work. Claimant was discharged for excessive absenteeism in violation of the employer's policy.

The employer has a written attendance policy regarding attendance. The claimant received a copy of the policy and had access to the policy at work. The policy provided that 15 points can subject an employee to discharge. Employees are required to report their absences within 30 minutes following the beginning of their scheduled shift start time.

Claimant was absent from work on January 7, 2021 due to illness, which he properly reported. Claimant was absent from work on January 8, 2021 due to illness, which he properly reported. Claimant was absent from work on January 11, 2021 due to illness, which he properly reported. Claimant was absent from work on February 5, 2021 due to illness, which he properly reported. Claimant was absent from work on February 8, 2021 for an unknown reason, which he properly

reported. Claimant was absent on February 9, 2021 due to illness, which he properly reported. Claimant was absent on February 18, 2021 for an unknown reason. He contacted the employer to state he would be tardy to work but never showed up for his shift or called the employer back. Claimant was absent from work on February 19, 2021 stating that his mother was ill, which he properly reported. Claimant was absent from work on February 25, 2021 for an unknown family issue, which he properly reported. Claimant was absent from work on March 18, 2021 due to vehicle issues, which he properly reported. Claimant was absent from work on April 1, 2021 due to lack of financial resources to come to work, which he properly reported. Claimant was absent from work on May 13, 2021 for an unknown reason, which he properly reported. Claimant was absent from work on June 14, 2021 due to illness, which he properly reported. Claimant was absent from work on June 24, 2021 for an unknown reason, which he properly reported. Claimant was absent from work on June 25, 2021 due to a doctor visit, which he properly reported. Claimant was absent on August 6, 2021 for an unknown reason, which he properly reported. Claimant was absent on August 19, 2021 for an unknown reason, which he properly reported. Claimant was absent on August 20, 2021 for an unknown reason, which he properly reported. Claimant was absent on August 24, 2021 for an unknown reason, which he properly reported. Claimant was absent on September 16, 2021 for an unknown reason, which he properly reported. Claimant was absent on September 17, 2021 for an unknown reason, which he properly reported. Claimant was absent on October 12, 2021 for an unknown reason, which he properly reported. Claimant was tardy to work on October 16, 2021 for an unknown reason. Claimant was absent from work on November 11, 2021 for an unknown reason, which he properly reported. Claimant was absent from work on November 14, 2021 when he left his scheduled shift six hours early. He did not notify anyone he was leaving his shift early on November 14, 2021 and did not come back to work. He later notified the employer that he left work early on November 14, 2021 because he had to let a contractor into his apartment.

Claimant had received various written disciplines regarding his excessive absenteeism, most recently on October 13, 2021 and November 14, 2021. The November 14, 2021 final written warning notified him that his job was in jeopardy and that he could be discharged for continued excessive absenteeism.

Claimant's administrative records establish that he filed an initial claim for unemployment insurance benefits with an effective date of November 28, 2021. Claimant filed weekly-continued claims for benefits from November 28, 2021 through January 1, 2022 and the claimant has been paid \$2,085.00 in unemployment insurance benefits funded by the State of Iowa. No fact-finding interview was conducted regarding the claimant's separation from employment and the employer did not receive any notification that a fact-finding interview would occur.

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. Benefits are denied.

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 Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

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. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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 assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.* Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armell v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

In this case, the claimant had unexcused absences on February 8, 2021; February 18, 2021; March 18, 2021; April 1, 2021; May 13, 2021; June 24, 2021; August 6, 2021; August 19, 2021; August 20, 2021; August 24, 2021; September 16, 2021; September 17, 2021; October 12, 2021; October 15, 2021; October 16, 2021; November 11, 2021 and November 14, 2021. This amount of unexcused absences is excessive and in violation of the employer's written policy, which the claimant was aware of. As such, a final incident of substantial job-related misconduct has been established and the separation from employment is disqualifying. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7)a-b, 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) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

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 unrebutted 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.

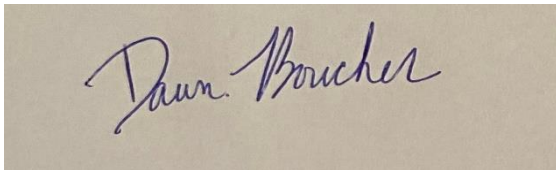
Because the claimant's separation was disqualifying, benefits were paid after his separation from employment which he was not entitled to. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those benefits, 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 if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). The administrative law judge finds that the employer was not properly contacted nor given the opportunity to participate in any fact-finding interview. Pursuant to Iowa Code § 96.3(7) and Iowa Admin. Code r. 871-24.10, the law states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits." Iowa Code § 96.3(7)(b)(1)(a).

Benefits were not allowed because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were allowed because the employer did not receive any telephone call to participate in any fact-finding interview. Given these facts, the employer's account shall not be charged for benefits paid and the claimant is not required to repay the benefits he received. Any charges for this claim should be absorbed by the fund.

DECISION:

The December 13, 2021 (reference 01) unemployment insurance decision is reversed. The claimant's separation was disqualifying. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount after his November 16, 2021 separation date, and provided he is otherwise eligible.

The claimant has been overpaid regular unemployment insurance benefits funded by the State of Iowa in the amount of \$2,085.00 but he is not obligated to repay the agency those benefits received. The employer's account may not be charged for benefits paid as it was not permitted to participate in any fact-finding interview. Any charges shall be absorbed by the fund.



Dawn Boucher
Administrative Law Judge

February 24, 2022
Decision Dated and Mailed

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