

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL D HILLIS
Claimant

MENARD INC
Employer

APPEAL 21A-UI-11285-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/07/21
Claimant: Respondent (4)**

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
PL 116-136 Sec 2104 – Federal Pandemic Unemployment Compensation (FPUC) Benefits

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the April 1, 2021 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits based upon claimant's discharge from work on February 12, 2021. The parties were properly notified of the hearing. A telephone hearing was held on July 8, 2021. The claimant participated personally and was represented by Attorney Michael Winter. The employer, Menard Inc., was represented by James Anderson and participated through witnesses Sam Park, Meredith Bradley, and Nolan Fillipi. Employer's Exhibits 1 through 7 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records. The hearing was consolidated with Appeal No. 21A-UI-11141-DB-T.

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?
Was the claimant eligible for or overpaid FPUC benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time electrical manager. He began his employment on November 7, 2018 and his last day physically worked on the job was February 2, 2021. Claimant was discharged from employment on February 20, 2021.

The employer has a written attendance policy providing that an employee may be discharged if they accumulate 10 attendance points during a rolling 12-month period. See Exhibit 1. Claimant acknowledged the policy on November 7, 2018. See Exhibit 1.

Claimant was tardy to work on November 28, 2020 due to an unknown reason. See Exhibit 2. Claimant was tardy to work on November 29, 2020 due to an unknown reason. See Exhibit 2.

Claimant was tardy to work on January 11, 2021 due to an unknown reason. See Exhibit 2.
Claimant was tardy to work on February 2, 2021 due to an unknown reason. See Exhibit 2.
Claimant was absent from work on February 4, 2021 due to an unknown reason. See Exhibit 2.
Claimant was absent from work on February 5, 2021 due to personal problems. See Exhibit 2.

Claimant was approved for vacation leave from February 6, 2021 through February 19, 2021. Claimant travelled out of the State of Iowa on vacation. Prior to leaving for vacation, claimant spoke with Mr. Park about transferring to a part-time position due to personal issues and other time commitments the claimant had. Mr. Park agreed that the claimant could transfer to a part-time position with the plumbing department and that he would be scheduled to work on February 20, 2021 when he had returned from vacation. Claimant's new supervisor in the plumbing department was to be Cody Golden.

Claimant did not report for his scheduled work shift on February 20, 2021 and he did not call the employer to report an absence. Claimant did not return from vacation until February 23, 2021 due to vehicle issues. While the claimant was still out of the State of Iowa, Cody Golden called him and left a message that he had been discharged from employment due to a no call no show on February 20, 2021.

Claimant attempted to call Mr. Golden back; however, he was unable to get the call to go through. He used his daughter's telephone to call Mr. Golden and was able to speak with him. He was again informed that he had been discharged due to a no call no show. Claimant explained that he was not aware that he was scheduled to work on February 20, 2021.

Claimant had been unable to check the online system that employees use to receive notification of their scheduled hours. Claimant did not contact the employer to determine his scheduled hours when he realized that he was unable to use the online scheduling system. Claimant attempted to contact Mr. Park and Ms. Bradley regarding his discharge from employment; however, the calls did not go through using his cell phone. He did not use any other phone to attempt to call Mr. Park or Ms. Bradley.

On January 19, 2021, the claimant had received a written warning regarding attendance. See Exhibit 5. The warning instructed him that "further accumulation of points will result in additional discipline, up to and including termination as follows ..." See Exhibit 5.

Claimant received regular unemployment insurance benefits funded by the State of Iowa in the amount of \$7,296.00 from March 7, 2021 through June 26, 2021. The claimant has also received FPUC benefits in the amount of \$4,200.00 from March 7, 2021 through June 12, 2021 (\$300 per week for 14 weeks).

Claimant's administrative records indicate that no fact-finding interview was conducted. The employer's representatives did not receive any notification of a fact-finding interview date and time and as such, did not participate in any fact-finding interview.

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.

The employer has the burden of proof in establishing disqualifying job-related misconduct. *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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job*

Serv., 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer’s interests. *Henry v. Iowa Dep’t of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

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.

Excessive absences are not considered misconduct unless unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). 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 November 28, 2020; November 29, 2020; January 11, 2021; February 2, 2021; February 4, 2021; February 5, 2021 and February 20, 2021. Claimant was aware that the employer had a policy prohibiting excessive absenteeism. Claimant violated the policy on seven separate occasions in less than a three-month period. This amount is considered excessive and is considered a material breach of his duties and obligations that arose out of his contract of employment with the employer. The employer has established that the claimant was discharged for a final incident of substantial job-related misconduct. Unemployment insurance benefits are denied. Because benefits are denied, the issues of overpayment of benefits and chargeability must be addressed.

Iowa Code § 96.3(7)a-b 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 no fact-finding interview was conducted and the issuance of benefits was not due to the employer's non-participation. 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).

In this case, the employer was never notified or telephoned to participate in any fact-finding interview. Benefits were not allowed because the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. Instead, benefits were allowed because the employer did not receive any notification or opportunity 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 regular unemployment insurance benefits funded by the State of Iowa that he received in the amount of \$7,296.00 from March 7, 2021 through June 26, 2021. Any charges for this claim should be absorbed by the fund.

The next issue is whether the claimant is overpaid FPUC benefits. The administrative law judge finds that he is.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment. – In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled,

the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

PL 116-136 Section 2104 of the CARES Act created a program in which an additional \$600.00 per week was payable to claimants who were eligible for at least \$1.00 per week in benefits stemming from other programs including regular unemployment insurance funded by the State of Iowa, Pandemic Emergency Unemployment Compensation, Pandemic Unemployment Assistance, Iowa Extended benefits, and Trade Act benefits. This initial program ran from March 29, 2020 through July 25, 2020. Claimants were only eligible to receive FPUC payments if they were entitled to receive benefits from another applicable program. The payments of FPUC benefits were automatic so long as a claimant was determined to be eligible under one of the other applicable programs. On December 27, 2020, the President signed into law the Consolidated Appropriations Act, 2021, which includes Division N, Title II, Subtitle A, the Continued Assistance Act. Section 203 reauthorized the FPUC program for weeks of unemployment beginning after December 26, 2020 and ending on or before March 14, 2021 and modified the weekly supplement payment to \$300.00. On March 11, 2021, the President signed the American Rescue Plan Act of 2021 (ARPA). Section 9103 of ARPA amends Section 2104 of the CARES Act of 2020 and extended the FPUC program for weeks of unemployment ending on or before September 6, 2021. On May 11, 2021, Governor Reynolds announced that Iowa would end its participation in federal pandemic-related unemployment benefit programs effective June 12, 2021. The last payable week for FPUC benefits in Iowa was the week ending June 12, 2021.

In this case, the claimant received FPUC benefits from March 7, 2021 through June 12, 2021 because at that time there was no disqualifying decision that found he was not eligible for regular unemployment insurance benefits funded by the State of Iowa. The FPUC benefits were paid in conjunction with and based upon his eligibility for regular unemployment insurance benefits funded by the State of Iowa. As soon as the claimant was disqualified from receipt of regular unemployment insurance benefits, he was no longer eligible for FPUC benefits. The repayment of FPUC benefits also does not turn on participation in a fact-finding interview.

Because the claimant has not been found eligible for regular unemployment insurance benefits or any other qualifying program in which FPUC benefits would be allowed, the claimant has been overpaid FPUC benefits in the amount of \$4,200.00 for the weeks between March 7, 2021 and June 12, 2021 (\$300 per week).

Pursuant to PL 116-136 Section 2104(F)(2) of the CARES Act, the claimant may request a waiver of the overpayment of FPUC benefits. Whether the claimant is eligible for a waiver shall not be addressed in this decision. The request for waiver should be sent to:

Iowa Workforce Development
Overpayment Waiver Request
1000 East Grand Avenue
Des Moines, Iowa 50319

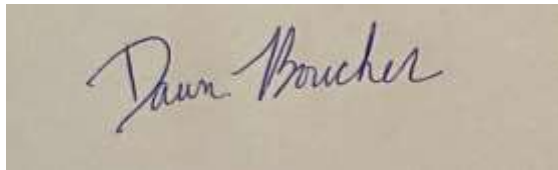
The request for waiver of overpayment should include the claimant's name, address, decision number and date of decision, dollar amount of overpayment requested for waiver, and all relevant facts the claimant feels would justify a waiver of the overpayment balance. The claimant may also visit <https://www.iowaworkforcedevelopment.gov/application-overpayment-waiver>. An appealable decision regarding whether the claimant is allowed a waiver shall be issued to the claimant if a waiver is requested.

DECISION:

The April 1, 2021 (reference 01) unemployment insurance decision is modified in favor of the appellant. The claimant was discharged due to a current act of substantial job-related misconduct. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount after his February 20, 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 \$7,296.00 between March 7, 2021 and June 26, 2021 but 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.

The claimant has been overpaid FPUC benefits of \$4,200.00 for fourteen-weeks between March 7, 2021 and June 12, 2021. Those benefits must be repaid to Iowa Workforce Development unless a waiver is granted.

A rectangular box containing a handwritten signature in blue ink that reads "Dawn Boucher".

Dawn Boucher
Administrative Law Judge

July 20, 2021
Decision Dated and Mailed

db/ol