IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ZACHARY PRICE
Claimant

TSI ENTERPRISES INC
Employer

APPEAL NO. 14A-UI-02896-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/16/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

TSI Enterprises (employer) appealed a representative's March 12, 2014, decision (reference 01) that concluded Zachary Price (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 8, 2014. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Charity Stone, Account Manager, and Jamie Folker, On Site Coordinator. The record closed at 10:23 a.m. on April 8, 2014. At 4:12 p.m. on April 8, 2014, the claimant called regarding the hearing. The administrative law judge spoke to the claimant on April 9, 2014. The claimant did not read the notice before the hearing.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on May 25, 2010, as a full-time general laborer assigned to work at Grain Processing. The employer has a handbook with its policies. On January 22, 2013, the employer issued the claimant a warning for attendance. The claimant was absent due to illness three times and three times for personal reasons. The employer notified the claimant that further infractions could result in termination from employment. On November 26, 2013, the employer issued the claimant a warning for attendance. The claimant was absent due to illness two times and two times for personal reasons. The employer notified the claimant that further infractions could result in termination from employment. The claimant was absent on February 7, 8, and 9, 2014, to travel out of town with his fiancée to see her father who was incarcerated. The employer terminated the claimant on February 10, 2014.

The claimant filed for unemployment insurance benefits with an effective date of February 16, 2014. He has received no unemployment insurance benefits after his separation from employment. The employer participated personally at the fact-finding interview on March 11, 2014, by Sarah Fiedler.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
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> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the April 8, 2014, hearing was after the hearing had been closed. Although he had intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. Intent alone is not sufficient. An intent must be accompanied by an overt act carrying out that intent. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). In the case of an appeal hearing, that overt act is to call the Appeals Section and provide a telephone number where the party may be contacted. The claimant did not do this and therefore has not established good cause to reopen the hearing. The claimant's request to reopen the hearing is denied.

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. 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 final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The representative's March 12, 2014, decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant has not received any unemployment insurance benefits.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs