

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIKAYLA PETTY
Claimant

APPEAL NO: 17A-UI-06395-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 05/14/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 13, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 11, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Nura Pudic, General Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assistant manager for Kum & Go from July 17, 2015 to May 19, 2017. She was discharged from employment due to a final incident of absenteeism that occurred on May 13, 2017.

The claimant was a no-call/no-show March 22 through March 26, 2017. The employer met with the claimant March 27, 2017, and she was tearful, stating she was absent without calling for personal reasons and asked the employer for another chance. The employer agreed to give the claimant a second chance but told her if it happened again her employment would be terminated. On April 30, 2017, the claimant was again a no-call/no-show. On May 1, 2017, the claimant sent the employer a message saying she was in the emergency room and could not reach anyone April 30, 2017. The employer issued the claimant a written warning and told her if she had another no-call no-show absence it would have no choice but to end her employment. On May 12, 2017, the claimant filed a report with the employer stating she tripped on a mop May 11, 2017. On May 13, 2017, the claimant was a no-call/no-show and after trying unsuccessfully to reach the claimant May 13 and May 14, 2017, the employer decided to terminate her employment. On May 15, 2017, the claimant called the employer and asked if her

employment was terminated. The employer confirmed that it was and the claimant stated she was in the emergency room and could not reach the employer. The claimant accused the employer of terminating her employment because she filed the report about tripping on the mop. The employer denied that allegation and told the claimant her employment was terminated for failing to notify the employer of her absence so it could secure coverage for the store. The claimant did not provide the employer with a note indicating she was in the emergency room May 13, 2017.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,285.00 for the seven weeks ending July 8, 2017.

The employer personally participated in the fact-finding interview through the statements of General Manager, Nura Pudic.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(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).

The claimant accumulated five consecutive no-call/no-show absences toward the end of March 2017. Under Iowa law, three consecutive no-call/no-show absences constitutes a voluntary leaving of employment but rather than determining the claimant quit her job at that time the employer chose to give her another chance while admonishing her that if it happened again her employment would be terminated. Just over one month later the claimant was again a no-call no-show. She told the employer she was in the emergency room and unable to reach anyone with the employer and consequently the employer issued her a written warning and told her the next incident would result in her termination. Thirteen days after that no-call/no-show,

on May 13, 2017, the claimant was a no-call/no-show again. The employer was concerned about her and attempted to contact her May 13 and May 14, 2017 to no avail. The claimant called the employer May 15, 2017, and asked if her employment was terminated. The employer informed her that she was indeed being discharged and the claimant said she had been in the emergency room and unable to reach anyone with the employer. She filed an incident report May 12, 2017, after tripping on a mop May 11, 2017, and accused the employer of terminating her for that reason. The employer denies that allegation and the administrative law judge finds the claimant's accusation unpersuasive. The claimant accumulated seven no-call/no-show absences between March 22 and May 13, 2017. That is an excessive number of no-call/no-show absences and if the employer wanted to be rid of the claimant for any reason it could have determined she voluntarily quit after her third consecutive absence in March 2017. Instead, the employer gave the claimant at least two chances to retain her employment despite the large number of no-call/no-show absences, clearly attempting to help her keep her job. Additionally, after the claimant said she went to the emergency room April 30, 2017, but could not reach the employer and was told another incident would result in her termination, she should have done everything in her power to contact the employer May 13, 2017, and at least provide the employer with a note from the emergency room proving she was in fact, at the emergency room. Instead the claimant failed to call or show up for work despite being given two chances in a five week period of time to improve her attendance.

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 absenteeism, is considered excessive. Therefore, benefits must be denied.

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 un rebutted 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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$2,285.00 for the seven weeks ending July 8, 2017.

DECISION:

The June 13, 2017, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer participated in the fact-finding interview within the meaning of the law. The claimant is overpaid benefits in the amount of \$2,285.00 for the seven weeks ending July 8, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn