IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRIAN M HUTT Claimant **HY-VEE INC** Employer	**APPEAL NO. 24A-UI-02326-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/24** **Claimant: Respondent (2)**

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.5(2)(a) & (d) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

On February 27, 2024, the employer filed a timely appeal from the February 19, 2024 (reference 02) decision that allowed benefits to the claimant, provided the claimant was otherwise eligible, and that held the employer's account could be charged for benefits, based on the deputy's conclusion the claimant was discharged on January 13, 2024 for no disqualifying reason. After due notice was issued, a hearing was held on March 25, 2024. Brian Hutt (claimant) did not comply with the hearing notice instruction to call the designated toll-free number at the time of the hearing and did not participate. Barbara Buss of Corporate Cost Control represented the employer and presented testimony through Tara Smith, Antonia Signorelli and Tom Edwards. Exhibits 1 through 7 were received into evidence. The administrative law judge took official notice of the following IWD administrative records: DBRO and KFFV. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview.

At 12:25 p.m. on March 25, 2024, the claimant emailed a reschedule request to the Appeals Bureau regarding the hearing set for 2:00 p.m. that day. The claimant asserted that his legal counsel was unable to attend the hearing as scheduled. No attorney has entered an appearance in this matter. The claimant did not name an attorney. The claimant's request provided no explanation regarding why the claimant, rather than the purported attorney, was making the reschedule request. The claimant provided no good cause justification for the untimeliness of the reschedule request. At 12:58 p.m. on March 25, 2024, the administrative law judge sent an email message to the email address the claimant had used to make the reschedule request. The administrative law judge denied the untimely reschedule request and directed the claimant to follow the hearing notice instructions to call in for the hearing at the scheduled hearing time. The claimant did not comply.

ISSUES:

Whether the claimant was laid off, discharged for misconduct in connection with the employment, or voluntarily quit without good cause attributable to the employer.

Whether the claimant was overpaid benefits.
Whether the claimant must repay overpaid benefits.
Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Brian Hutt (claimant) was employed by HyVee as a part-time cashier/clerk at the Windsor Heights HyVee store from October 2023 and last performed work for the employer on January 13, 2024. On January 13, 2023, the claimant refused to sell alcohol to a customer of legal age to purchase alcohol. Mr. Hutt refused the sale despite the customer's presentation of a valid ID. The customer was a person in his fifties, clearly old enough to legally purchase alcohol. The claimant declined to sell alcohol to the customer because the customer presented a valid ID from a jurisdictional authority other than the Iowa Department of Transportation. HyVee's alcohol sales policy limits sales to persons of legal age to purchase alcohol but does not limit the sale of alcohol to only those customers who present an Iowa driver's license.

The customer was upset by the declined sale and complained to a manager. Antonia Signorelli, Front End Service Manager, addressed the customer's complaint. As part of that process, she asked that Mr. Hutt to apologize to the upset customer. Mr. Hutt refused the request. Mr. Hutt then became belligerent toward Ms. Hutt. Because Mr. Hutt was raising his voice toward Ms. Signorelli, Ms. Signorelli moved the conversation upstairs to the management office. The claimant continued to be belligerent and proceeded to clock out prior to the end of his shift. The claimant then threatened to get Ms. Signorelli fired whilst asserting he knew people higher in the company than Ms. Signorelli. The employer said nothing and did nothing on January 13, 2024 to indicate or suggest the employer was suspending the claimant or terminating the employment.

Tara Smith, Human Resources Manager, had been away from the workplace on January 13, 2024 and returned to work on January 15, 2024. At that time, Ms. Smith learned of the January 13, 2024 incident through the manager's communication log. Ms. Smith noted that Mr. Hutt was scheduled to work on January 15, 2024 from noon to 4:30 p.m. When Mr. Hutt did not appear for the shift or give notice that he would be absent, Ms. Smith called and spoke with Mr. Hutt. Ms. Smith asked whether Mr. Hutt was okay. Mr. Hutt stated that he was embarrassed about the January 13, 2024 incident. Ms. Smith told Mr. Hutt that there was nothing to be embarrassed about and that Mr. Hutt should have spoken with the employer if there was a need to be absent on January 15, 2024, rather than being a no-call/no-show for the shift. Ms. Smith told Mr. Hutt that she would like to hear Mr. Hutt's side regarding the January 13 incident and would like for Mr. Hutt to listen to her side of the matter as well. Ms. Smith mentioned that Mr. Hutt was next scheduled to work on January 18, 2024 from 8:30 a.m. to 4:30 p.m. Ms. Smith told Mr. Hutt she would be out that day but would be present during Mr. Hutt's 8:00 a.m. to 3:00 p.m. shift on January 19, 2024 and could meet with him then. Ms. Smith said nothing to indicate or suggest that the claimant should not appear for subsequent shifts or that the claimant was suspended or discharged from the employment. The employer was not planning to discipline the claimant in connection with the refused alcohol sale and intended instead to provide guidance to Mr. Hutt. The claimant was thereafter absent from the January 18 and 19 shifts without notice to the employer.

The employer has a written attendance policy set forth in the Hy-Vee corporate employee handbook and another written attendance policy set forth in the Windsor Heights Hy-Vee Policy Manual. The corporate policy required that the claimant personally contact the store director or

supervisor prior to the scheduled start of the shift if he needed to be absent. The employer's written attendance policy in the Windsor Heights Policy Manual required that the claimant call the store at least two hours prior to the scheduled start of his shift and speak with a manager if he needed to be absent. The employer reviewed the policies with the claimant during orientation at the time of hire. The claimant signed to acknowledge the policies. The employer advises that it lacks a policy that deems a certain number of consecutive no-call/no-show absences to be a voluntary quit.

After the claimant had been a no-call/no-show for three consecutive shifts, the employer determined the employment was terminated.

On January 18, 2024, Kari Nelson, Human Resources Manager at the West Lakes HyVee in West Des Moines notified Ms. Smith that Mr. Hutt had applied for a job in that store's dairy department. Ms. Nelson asked whether Ms. Smith was aware that Mr. Hutt was interested in a transfer and asked about his attendance and work performance. On January 19, 2024, Ms. Smith notified Ms. Nelson that Mr. Hutt had been a no-call/no-show three times, that he had stopped reporting for work after an incident with a customer, and that the Windsor Heights HyVee was terminating the employment. Ms. Nelson thanked Ms. Smith for the information and stated the West Lakes store would not be proceeding with an interview.

Mr. Hutt established an original claim for benefits that was effective January 21, 2024. Iowa Workforce Development set the weekly benefit amount at $191.00. Hy-Vee is not a base period employer in connection with the claim and, therefore, has not been charged for benefits. IWD paid $1,528.00 in benefits to Ms. Hutt for eight weeks between January 21, 2024 and March 16, 2024.

On February 16, 2024, Iowa Workforce Development Benefits Bureau held a fact-finding interview that addressed Mr. Hutt's separation from HyVee. Ms. Smith represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 87124.1(113) characterizes the different types of employment separations as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *See Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 87124.25.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

When a claimant was absent for three days without giving notice to employer in violation of company rule, the claimant is presumed to have voluntarily quit without good cause attributable to the employer. See Iowa Admin. Code r. 871-24.25(4).

Iowa Code section 96.5(2)(a) and (d) provides as follows:

> 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 disqualification shall continue 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.
> …
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:
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> …
> (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
> …
> (9) Excessive unexcused tardiness or absenteeism.
> …

See also Iowa Admin. Code r. 871-24.32(1)(a) (duplicating the text of the statute).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*,

616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r.871 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 87124.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

Whether one concludes the claimant was discharged from the employment or voluntarily quit the employment, the evidence in the record establishes a disqualifying separation from the employment. The claimant was absent from three consecutive shifts without notice to the employer. The lack of notice violated the employer's absence reporting policy. The claimant's three no-call/no-show absences were sufficient to indicate a voluntary quit from the Windsor Heights Hy-Vee employment, regardless of the claimant's pursuit of a different job at a different Hy-Vee store. If one deems the separation a discharge, the discharge occurred on January 19, 2024, after the claimant had been a no-call/no-show for three consecutive shifts. The employer had done nothing on January 13, 2024 to indicate the employer was terminating the employment at that time. Each no-call/no-show absence was an unexcused absence under the applicable law. The unexcused absences were excessive and communicated an intentional and substantial disregard for the employer's interests. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account will not be charged.

Iowa Code section 96.3(7) provides in relevant part as follows:

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. If the department determines that an employer's failure to respond timely or adequately was due to insufficient notification from the department, the employer's account shall not be charged for the overpayment.

(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.

Iowa Administrative Code rule 87124.10(1) and (4), regarding employer participation in fact-finding interviews, provides as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(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.
> …
> (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.

The claimant received $1,528.00 in benefits for eight weeks between January 21, 2024 and March 16, 2024. Because the present decision disqualifies the claimant for those benefits, the benefits the claimant received are an overpayment of benefits. Because Hy-Vee is not a base period employer, Hy-Vee's account has not been charged for benefits and cannot be charged in connection with the claim that was effective January 21, 2024. Because Hy-Vee participated in the fact-finding interview, the claimant must repay the overpaid benefits.

DECISION:

The February 19, 2024 (reference 02) decision is REVERSED. The claimant voluntarily quit effective January 19, 2024 without good cause attributable to the employer by being absent without notice from three consecutive shifts in violation of the employer's attendance policy. In the alternative, the claimant was discharged on January 19, 2024 for misconduct in connection with the employment, based on excessive unexcused absences. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged. The claimant is overpaid $1,528.00 in benefits for the eight weeks between January 21, 2024 and March 16, 2024. The claimant must repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

April 1, 2024
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.