IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID O LARSEN Claimant **HUDSON RESTAURANTS – CB INC** Employer	**APPEAL 16A-UI-13666-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/27/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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:

Hudson Restaurants – C.B., Inc. (employer) filed an appeal from the December 13, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to provide sufficient evidence to show it discharged David O. Larsen (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on January 20, 2016. The claimant did not respond to the hearing notice and did not participate. The employer participated through Operating Partner Joe Radicia. Employer's Exhibit 1 was received.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?
Has the claimant been overpaid unemployment insurance benefits?
Can the repayment of those benefits to the agency be waived?
Can 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: The claimant was re-hired full-time as a Supervisor beginning on November 16, 2014, and was separated from employment on November 15, 2016.

The employer has a policy that states after one no-call/no-show absence an employee is considered to have abandoned his or her job or voluntarily quit employment. The claimant was scheduled to work on November 14, 2016. He was a no-call/no-show because he overslept. He reported to work the following day and signed a form stating he was "voluntarily terminating" his employment. (Employer's Exhibit 1, page 9.)

The claimant had received prior warnings related to attendance. He was regularly tardy to work; however, the employer did not document all of his tardiness. On July 28, 2016, the claimant received a written warning because he was ten minutes late as he was donating blood. The claimant did not notify anyone that he was going to be late. On September 17, 2016, the claimant received a written warning as he had left work 15 minutes before the end of his prior shift. He did not notify anyone he was leaving and had been specifically told by the Manager that he needed to stay until another Supervisor arrived at work. On October 28, 2016, the claimant overslept and was a half-hour late to work. He only woke up when the Operating Partner Joe Radicia called him to find out why he had not reported to work. Radacia gave him a verbal warning. He told the claimant that it was essential he correct his attendance or he would no longer have a job.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,370.00, since filing a claim with an effective date of November 27, 2016, for the five weeks ending December 31, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit his employment but was discharged due to job-related misconduct. Benefits are denied.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

An individual who is absent for three days without giving notice to the employer in violation of a company policy is presumed to have voluntarily quit his or her employment without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4). Since the claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment nor did he express an intention to quit his employment, the separation was a discharge and not a quit.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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).

The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. 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, supra.*

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has documented and can provide details about three of the claimant's absences prior to the final incident. One absence was due to oversleeping, one was related to a personal errand, and one absence was in violation of a direct order with no reason for the absence provided. The claimant's three documented absences were all unexcused. 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.7. 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. Iowa Admin. Code r. 871-24.10(1). 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The December 13, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to

ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $1,370.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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