

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

KENNETH A. JONES
Claimant

TWIN CITY TANNING WATERLOO LLC
Employer

APPEAL 23A-UI-02737-CS
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/05/23
Claimant: Respondent (1R)

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit
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:

On March 6, 2023, the employer/appellant filed an appeal from the February 22, 2023, (reference 01) unemployment insurance decision that allowed benefits based on claimant being dismissed on January 31, 2023. The Iowa Workforce Development representative determined there was no evidence of willful or deliberate misconduct. The parties were properly notified about the hearing. An in person hearing was held in Waterloo, Iowa on April 5, 2023. Claimant did not participate. Employer participated through Controller, Kris McCarthy. Accountant Faye Schares was called as a witness. Employers Exhibits 1, 2, 3, 4, 5, 6, and 7 were admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits records including DBRO.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Should claimant repay benefits?
- III. Should the employer be charged due to employer participation in fact finding?
- IV. Is the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on July 27, 2021. Claimant last worked full-time in maintenance. Claimant was separated from employment on January 31, 2023, when he was discharged.

The employer has an attendance policy where employees are given ten points. If an employee is absent their point total is reduced by 1.5 points. If an employee does not call in or show up for

work their points are reduced by 2.5 points. If an employee is late or leave early their points are reduced by 1 point. If an employee does not have any points reduced during a four-week cycle then they accumulate a point to add to their point total. The employer's policy informed employees they would receive a verbal and written warning when their points were reduced to 7 points, 5 points, and at 3 points they would get a written warning and suspended for three days.

On January 30, 2023, claimant was required to attend work for a mandatory training. The employer had a special company traveling to the employer's premises to train its employees on a piece of equipment. (Exhibit 2). Claimant did not call in or show up for work.

On January 31, 2023, claimant arrived for work and the employer asked why claimant had missed the mandatory training. Claimant responded that he got drunk and had passed out in his car. (Exhibit 2). Claimant was terminated on January 31, 2023, for his attendance due to not calling in or showing up for work on January 30, 2023. (Exhibit 1).

According to employer's records claimant was late for work or left early in 2022 the following dates: February 2, 9, and 23; March 2, 16, 30; April 13; May 4; June 1; July 8; August 3; September 12, 15, 19, and 22; October 12; November 2, 9, and 17th. The employer does not know if he called in prior to his shift and the reasons for being late or leaving early. The other absences claimant had were related to being ill.

Claimant received a prior written warning regarding his attendance on January 27, 2023 due to him arriving late for work. Claimant was informed he would received a second written warning if he incurred additional points. Claimant was not informed he would be discharged or that he job was in jeopardy if he missed additional work.

Claimant filed for benefits with an effective date of February 5, 2023. (DBRO). Claimant's gross weekly benefit amount is \$551.00. Claimant began receiving benefits February 5, 2023. (DBRO). Claimant received three weeks of benefits through the week ending March 11, 2023. (DBRO). Claimant has received a gross total of \$1,653.00 in unemployment benefits.

The employer appeared and participated in the fact-finding interview with Iowa Workforce Development. The employer provided additional documents after the interview had concluded.

The employer testified they offered claimant his job and he refused the offer. A determination on whether there was a job refusal has not been made by Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

Iowa Code section 96.5(2) d provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

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 even 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:

(9) Excessive unexcused tardiness or absenteeism.

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 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). Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 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. *Gaborit*, supra.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

In this case the last absence was related to a no call, no show. At the hearing Ms. McCarthy argued that it was due to insubordination. However, the employer’s exhibits list the reason for his discharge was due to attendance. (See Exhibit 1). As a result, the administrative law judge is analyzing this case as a discharged due to attendance. In this case the claimant’s last absence was due to a no call no show as a result of claimant falling asleep in his car drunk. This is an unexcused absence because the reason for his absence was unreasonable and it was not properly reported. Claimant had numerous instances of tardiness and early leaves. However, the employer’s attendance policy requires warnings at certain point levels. In this case claimant’s last written warning was on January 27, 2023. Claimant was informed he would receive another written warning if his attendance point level decreased. The warning did not indicate that he would be terminated or his job was in jeopardy if he missed additional work. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct and that he will be discharged for the conduct. According to the employer’s policy he still had points available before he would be discharged. The employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

Since claimant is eligible for benefits he has not been overpaid benefits at this time. There is an issue of whether claimant was offered a job by the employer and whether claimant refused the offer of work. This issue will be remanded for an investigation and determination by the benefits bureau. An overpayment of benefits may be issued if claimant is deemed to have refused an offer of work.

Since claimant is eligible for benefits at this time the employer’s account is subject to charged and the issue of whether employer participated in the fact-finding interview is moot.

DECISION:

The February 22, 2023, (reference 01) unemployment insurance decision is AFFIRMED. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Claimant has not been overpaid benefits. This may change pending the issue on remand. The employer’s account shall be charged for the benefits. The issue of whether employer participated in the fact-finding interview is moot since claimant is eligible for benefits.

REMAND:

The issue of whether the employer made an offer of work and the claimant refused the offer of work is remanded to the Benefits Bureau for an initial investigation and determination.



Carly Smith
Administrative Law Judge

April 6, 2023
Decision Dated and Mailed

scn

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: 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 se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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.