

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GARY HOFF**  
Claimant

**APPEAL NO: 15A-UI-03545-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TERRY MCGILL OF IOWA INC**  
Employer

**OC: 01/18/15**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Section 96.3-7 – Recovery of Benefit Overpayment  
871 IAC 24.10 – Employer Participation

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 10, 2015, 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 April 28, 2015. 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. Eric McGill, Vice-President and Laura Carter, Controller, 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 painter for Terry McGill of Iowa from October 28, 2013 to January 22, 2015. He was discharged from employment due to a final incident of no-call no-show absenteeism that occurred January 22, 2015.

The claimant was tardy November 3, 4, 5 and 6, 2014. He was absent due to the illness of himself or his daughter May 17, June 4, December 15 and 16, 2014, and January 5, 14 and 15, 2015. He was a no-call no-show.

On November 17, 2014, the claimant was a no-call no-show and received a verbal warning. During the warning the employer explained to him that if he accumulated another no-call no-show absence he would receive a two-day suspension and if he had another no-call no-show absence after that his employment would be terminated.

The claimant was a no-call no-show November 19, 2014, and received a two-day suspension. The employer told him at that time if he accumulated another no-call no-show absence his employment would be terminated. The claimant was a no-call no-show January 19, 2015. His foreman assumed he had been moved to another job and consequently did not report the claimant as absent or a no-call no-show. The claimant reported for work January 20, 2015, but was again a no-call no-show January 21, 2015, and the foreman realized he was not assigned to a different job and reported the absence to the employer. The claimant reported for work January 22, 2015. Vice-President Eric McGill spoke to the claimant and notified him that his employment was terminated. The claimant indicated he knew why Mr. McGill was speaking to him about his attendance and his no-call no-show absences and he said he “knew he messed up.” Mr. McGill told the claimant he was a good employee when he was there but the employer needed reliable employees.

There is no evidence that the no-call no-show absences were related to illness.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,827.00 for the seven weeks ending March 28, 2015.

The employer did not participate in the fact-finding interview at that time, but there is some question as to whether the employer received appropriate notice in advance of the fact-finding interview. The claimant has received unemployment insurance benefits after the separation.

#### **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 had four unexcused incidents of tardiness and seven incidents of excused absences due to illness between May 17, 2014 and January 15, 2015. In addition to those absences, the claimant accumulated four incidents of no-call no-show absences between November 17 and January 21, 2014. He received a verbal warning following his November 17, 2014, no-call no-show absence and was told he would receive a two-day suspension if it happened again and he would face termination if it happened three times, but despite that warning he was a no-call no-show two days later on November 19, 2014. He was then a no-call no-show January 19, 2015, but because his foreman assumed he was simply working another job that day he did not report the absence to the employer. The claimant showed up and worked January 20, 2015, but was then a no-call no-show January 21, 2015, and the employer terminated his employment January 22, 2015.

The employer has established that the claimant was warned that further unexcused, no-call no-show absences would result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of no-call no-show absences, is considered excessive. Therefore, benefits are denied.

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. 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.

The claimant in this case received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. While the employer did not participate in the fact-finding interview, there is some question whether the employer received proper notice so that its failure to participate should be excused. The matter is remanded the Benefits Bureau for a determination on the issue of participation and the determination of whether the overpayment is subject to recovery.

**DECISION:**

The March 10, 2015, reference 01, 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 matter is remanded the Benefits Bureau for a determination on the issue of participation and the determination of whether the overpayment is subject to recovery.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs