IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEPHON FLOOD
Claimant

HOMES OF OAKRIDGE HUMAN SERVICES INC/OAKRIDGE NBRHOOD & NBRHOOD SVCS
Employer

APPEAL NO: 18R-UI-08339-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/15/18
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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:

The employer filed an appeal from the May 1, 2018, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about a first hearing. A telephone hearing was held on June 1, 2018. The employer participated and the claimant did not. The initial decision was reversed in Appeal 18A-UI-05450-SC-T. The claimant appealed the decision to the Employment Appeal Board (EAB) and requested reopening. The EAB granted the claimant's request and remanded the matter for a new hearing so both parties could participate.

After proper notice, a hearing was conducted by telephone on August 27, 2018 with Administrative Law Judge, Jennifer Beckman. The claimant participated personally. His girlfriend, Ashley Murphy, attended as an observer for part of the hearing. The employer was represented by John Fatino, attorney at law. The employer participated through Facility Maintenance Manager Mike Hill and HR Administrator Esther Morris. The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-37 were admitted over objection. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct or did the claimant voluntarily quit the employment with good cause attributable to the employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 established his claim for unemployment insurance benefits effective April 15, 2018. The claimant was employed full-time as a maintenance repair person and was separated from employment on April 16, 2018. The evidence is disputed as to whether the claimant quit the employment or was discharged.

The employer has an attendance policy which tracks absences and tardies as occurrences. Upon receipt of eight occurrences in a one year period, an employee can be discharged. Tardies incurred would count as a ½ occurrence and absences count as one occurrence. The employer's policy defined a tardy as clocking in after start time, and required employees to notify management at least one hour prior to shift of an absence (Employer Exhibits 1, 5). The claimant's shift began each day at 8:00 a.m. The claimant denied receipt of the employer's written policy or any warning given to him during employment, which contained the employer's policy within.

The employer did not follow its attendance policy as it related to the claimant. At the time of his separation, the employer had documented 51 tardies and 10 absences without PTO (Employer Exhibits 7-9) over approximately nine months of employment. Mr. Hill stated he tried to work with the claimant and wanted to help him succeed.

The claimant was tardy on November 8, 9, 17, 21, 2017, December 1,5, 6, 7, 8, 9, 11, 12, 13, 15, 18, 19, 21, 26, 27, 28, 31, 2017, January 2, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 30, 2018, February 5, 6, 7, 8, 12, 13, 14, 15, 16, 2018, March 12, 13, 15, 19, 20, 21, 23, 29, 2018 and April 2, 2018. The claimant attributed his tardies to oversleeping, running late due to getting his children ready, and having to walk one mile to work.

The claimant was absent from work January 5, 8 and 9, 2018 due to illness, February 21-23, 2018, due to not wanting to walk to work, March 22, 2018 for unknown reasons, March 27 and 28, 2018 due to illness, and March 30, 2018 due to childcare.

In response to the claimant's ongoing attendance issues, Mr. Hill documented there being an issue in January (Employer Exhibit 10), COO Patricia Palmer also discussed it with the claimant on February 17, 2018 (Employer Exhibit 8), a written warning was prepared but the claimant did not sign on February 22, 2018 (Employer Exhibits 1-2). The employer also documented the claimant's suspension (Employer Exhibits 3-4).

The undisputed evidence is the claimant last performed work on April 2, 2018. The claimant clocked in three minutes late that day and was deemed tardy. At that time he was suspended by Mr. Hill and told he would be placed on suspension and Mr. Hill would be in contact with him. Mr. Hill asked Ms. Morris to draft a suspension letter, which she did (Employer Exhibit 3-4) and he attempted to hand-deliver to the claimant's residence. The claimant would not respond and did not receive the letter.

On April 9, 2018, the claimant was expected back to work. He did not show up to work, and text messaged Mr. Hill stating he would return on April 10, 2018. He did not return as expected, but was a no-call/no-show for three consecutive shifts; April 10, 11, and 12, 2018. A letter of separation was prepared in response and the employer separated the claimant effective April 16, 2018 (Employer Exhibits 5-6).

The claimant denied receipt of the letter, stating he believed he was discharged on April 2, 2018 when he was sent home by Mr. Hill. The claimant asserted Mr. Hill called the claimant on April 8, 2018 and asked him to come back to work, and the claimant said "no" because he didn't want to deal with "verbal abuse." In February 2018, the claimant reported to Ms. Palmer that he felt harassed. She followed up with Mr. Hill and management in response to the issues raised and the claimant stated they ceased thereafter. No additional complaints were brought to management before the claimant's separation. The claimant opined that he was targeted for discharge based upon his complaints made to Ms. Palmer about Mr. Hill.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,096.00, since filing a claim with an effective date of April 15, 2018, for the four weeks ending May 26, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification. Ms. Morris received the notice for the fact-finding interview and compiled documents. Before the date of the interview, she was hospitalized due to an unexpected health issue. The administrative record reflects that the fact-finder called the employer for the interview at the phone number provided but no one answered the phone (See administrative records/fact-finding documents).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being 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 dutiesand obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 the 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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 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. If the administrative law judge accepts the claimant's position that he was discharged and not suspended on April 2, 2018, he would still be disqualified from benefits, because the final tardy was unexcused. If the administrative law judge accepts the employer's position that the claimant was discharged after not returning from suspension and having three consecutive no-call/no-shows, he was discharged for reasons that would disqualify him from benefits because he failed to show that the final three absences of no-call/no-show would be excused under Iowa law.

It is troubling that the employer failed to follow its policy, in which case the claimant would have been discharged months before. However, the administrative law judge is persuaded the claimant knew that he was expected to be clocked into work at his 8:00 a.m. start time. He was tardy over 50 times, including his last day worked on April 2, 2018. In addition, he had 10 documented absences for illness, childcare, and transportation issues.

The undisputed evidence is that regardless of any complaints made by the claimant in February 2018, he continued a pattern of tardiness and the employer made him aware his job was in jeopardy. 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.

In the alternative, if the separation was categorized as a quit rather than discharge, the claimant would remain disqualified from benefits.

> 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.

Iowa Admin. Code r. 871-24.25(4), Iowa Admin. Code r. 871-24.25(22) and
Iowa Admin. Code r. 871-24.25(28) provide:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.
> (22) The claimant left because of a personality conflict with the supervisor.
> (28) The claimant left after being reprimanded.

If the claimant did indeed quit when he was called back to work by Mr. Hill, his quit would not be qualifying. The claimant's allegations of harassment brought to the employer's attention in February 2018 by the claimant are concerning but it cannot be ignored that once the employer management was made aware of the issues, they took immediate action, and the conduct ceased. Therefore the claimant's assertion of any intolerable work environment is moot. Accordingly, the administrative law judge would conclude the claimant failed to establish good cause for quitting, according to Iowa law.

The next issue is whether the claimant must repay the benefits he has received.
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 $1,096.00 in unemployment insurance benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The May 1, 2018, reference 02, 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 $1,096.00. However, he is not obligated to repay the agency those benefits as the employer did not participate in the fact-finding interview, and its account is subject to charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn