

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDITH WUSTROW
Claimant

APPEAL NO: 14A-UI-02350-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

THOMAS L CARDELLA & ASSOCIATES INC
Employer

OC: 01/12/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 19, 2014, reference 02, 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 March 25, 2014. The claimant participated in the hearing. Miranda Smith, Center Administrator; Jada Curry, Employer Representative/Witness regarding fact-finding participation; and Barbara Toney, Employer Representative; 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 part-time telephone sales representative for Thomas Cardella & Associates from August 18, 2008 to December 17, 2013. She was discharged after she did not return to work at the conclusion of her Family and Medical Leave (FML) and did not contact the employer or properly report her absences after exhausting her FML.

The claimant went on FML July 15, 2013, and was expected to return to work October 5, 2013. When the employer did not hear from the claimant during the timeframe surrounding her return it attempted to contact her but her phone was disconnected so the employer called the claimant's sister, who was her emergency contact, and the claimant returned the employer's call and stated her doctor had not released her to return to work yet but she had an appointment in the near future and would notify the employer of her status after that appointment. The claimant attempted to contact the employer two or three times after her appointment but not until November 2013. She spoke to her supervisor on one occasion but left a message for him to call her the two times she tried to call in the next few weeks after that. She did not ask to speak to anyone else. The employer held the claimant's job until December 17, 2013, but because it had not heard from the claimant it terminated her employment effective that date but did not notify the claimant of the discharge. The claimant contacted the employer in January 2014 and

was informed at that time that her employment was terminated. The claimant is able to work a 20-hour schedule as she was doing before going on FML.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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 section 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.

871 IAC 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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

The evidence in this case shows that the claimant was unable to return to work until approximately three months after she exhausted her FML. By the time the claimant's physician permitted her to return to her previous part-time hours, her employment had been terminated. While the claimant had not been released to return to work at the conclusion of her FML, she did not maintain contact with the employer about her status over the three month period following the end of her FML. The employer held her job until December 17, 2013, but eventually determined the claimant did not plan to return because she failed to contact the employer to inform it whether she had been released or when she anticipated being released. Had the claimant maintained contact with the employer, and properly reported her absences after her FML, and then her employment was terminated, she would likely be eligible for benefits. In this case, however, because the claimant did not notify the employer of her circumstances or properly report her absences between the expiration of her FML October 5, 2013, and contacting the employer in January 2014, the administrative law judge must conclude the claimant's action constitute disqualifying job misconduct. Therefore, benefits must be denied.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(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 un rebutted 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.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(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.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer’s account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the hearing personally and also provided documentation to the fact-finder. The claimant is overpaid benefits in the amount of \$1,953.00.

DECISION:

The February 19, 2014, reference 02, decision is reversed. The claimant was discharged from employment for disqualifying job misconduct in failing to properly report her absences following her FML. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,953.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs