

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

QUINN P SYMONDS

Claimant

APPEAL NO. 14A-UI-13200-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHUKEI CHEVROLET INC

Employer

OC: 10/19/14

Claimant: Respondent (2)

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated December 10, 2014, reference 01, which held claimant eligible to receive unemployment benefits. After due notice was provided, a telephone hearing was held on January 15, 2015. Although the claimant was duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Mr. Steve Schukei, Company President and Mr. Paul Harbacheck, Sales Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered all the evidence in the record, finds: Quinn Symonds was employed by Schukei Chevrolet, Inc. from September 2, 2014 until October 18, 2014 when he was discharged for excessive unexcused tardiness. Mr. Symonds was employed as a full-time auto sales representative and was paid a weekly salary of \$500 plus bonuses. His immediate supervisor was Paul Harbacheck.

Mr. Symonds was discharged on October 18, 2014, after he failed to report to work that day and provided no notification to the employer of his impending absence. Mr. Symonds had been scheduled to report at 8:30 a.m. that day to a company "tent sale" but failed to report or call in. The company sales manager attempted to call the claimant at 10:30 a.m. but received no answer. Later, approximately 3:00 p.m. that afternoon, the claimant called and indicated that he had overslept and had failed to hear his alarm clock.

Prior to the final incident, Mr. Symonds had been repeatedly warned by the employer regarding his lack of punctuality. The claimant had been tardy in reporting to work on an average of three

days per week and on four occasions had failed to report at all without providing any notification to the employer of his impending absences in violation of company policy.

Prior to beginning his employment with Schukei Chevrolet, Inc. Mr. Symonds indicated no medical problems that would prevent him from reporting to work timely and on a regular basis and provided no medical documentation to the employer to support any claim that he was unable to report for work for any medical reasons.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "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 duties and 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).

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of

unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

No aspect for the contract of employment is more basic than the right of the employer to expect that an employee will appear for work on the hour and day agreed upon. Recurrent failure to honor that obligation shows a substantial disregard for the employer's interests and thus may justify a finding of misconduct in connection with the employment.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. Tardiness is a form of absence. See 871 IAC 14.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absence related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness that are considered excused, providing that the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Mr. Symonds was repetitively tardy in reporting to work and had been warned on numerous occasions that his lack of punctuality was unacceptable and could jeopardize his employment. The evidence also establishes that Mr. Symonds did not follow the employer's call-in policy which required personal contact with the manager to report an impending absence. When the claimant continued to be excessively tardy after repeated warnings, a decision was made to terminate Mr. Symonds from his employment. On the final day, the claimant was to report to work at 8:30 a.m., but failed to report or to contact the employer until 3:00 p.m. that afternoon at which time he stated that he had "overslept." When the claimant began employment he indicated no medical reason that would prevent him from reporting to work on a regular and timely basis and the claimant provided no medical documentation to the employer throughout his employment indicating that he had any medical problem which would prevent him from meeting the employer's reasonable expectations regarding attendance and punctuality. There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's discharge took place under disqualifying conditions. Accordingly, unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law.

Because the claimant has been deemed ineligible for benefits any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$3157 since filing a claim with an effective date of October 19, 2014 for the week ending dates of October 25, 2014 through January 10, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview and make a first-hand witness available for rebuttal.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

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.

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 received 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 upon 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 on the part of the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code section 96.3.7. 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 representative's decision dated December 10, 2014, reference 01, is reversed. The claimant was discharged for misconduct in connection with his work. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$3157 and is liable to repay that amount. The employer shall not be charged because the employer participated in the fact finding in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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