

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GREGORY SCHMIDT
Claimant

APPEAL NO: 12A-UI-10302-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

XPAC
Employer

OC: 01/15/12
Claimant: Respondent (2/R)

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

XPAC (employer) appealed an unemployment insurance decision dated August 16, 2012, reference 03, which held that Gregory Schmidt (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 19, 2012. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which he could be contacted, and therefore, did not participate. The employer participated through Abby Fobert, Human Resources Generalist. Employer's Exhibits One through Six were admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a full-time department supervisor for this manufacturing company on January 30, 2012 and his last actual day of work was June 12, 2012. He properly reported his absences June 13, 2012 through June 15, 2012, which were due to a sick daughter. The claimant called in prior to his shift on Monday, June 18, 2012 to report his absence for personal family issues. He left a voice mail for the division manager prior to his shift on June 19, 2012 stating that he would be contacting the human resources department to discuss leave options with regard to his 14-year-old son, who was having mental issues. He did not specifically state he would not be at work. The claimant never contacted the human resources department.

The claimant was a no-call/no-show on June 20, 2012 and failed to report his absences at any time thereafter. The employer left him a voicemail on June 20, 2012 at 11:50 a.m. asking him to

contact Abby Fobert, the human resources generalist. Denise Kelly, the director of human resources, left the claimant her direct line, as well as her cell phone. The claimant called the director's direct line that night at 10:50 p.m. stating that he needed FMLA leave and would call her in the morning to discuss it. He did not call on June 21, 2012 and since he was not eligible for FMLA, the employer sent him paperwork for a personal leave of absence. The leave of absence paperwork was due on July 9, 2012.

The claimant was a no-call/no-show on June 22, 2012. He left Ms. Kelly a message on her direct line on June 25, 2012 at 6:06 a.m. stating that he would call at 10:00 a.m. The claimant did not call Ms. Kelly at 10:00 a.m. but did leave Ms. Fobert a voicemail message acknowledging receipt of the PLOA paperwork for a serious medical condition affecting his son. Ms. Fobert called the claimant and spoke with him. He said he had an appointment on June 28, 2012 and would give the paperwork to his doctor. The claimant did not state he would be off work until further notice. He was a no-call/no-show on June 26 and 27, 2012.

The employer received a fax on June 28, 2012 at 1:54 p.m. from the Family Counseling Center regarding the claimant. On the paperwork, he had checked that he had a serious medical condition, which was the first time the employer had notice of the claimant having a medical condition. Ms. Fobert and Employee Relations Manager Erin Hammond called the claimant but could only leave a message advising the claimant to call to discuss the PLOA paperwork. Ms. Fobert left her direct number and advised the claimant to have her paged if she was not available. The claimant did not return the call.

The claimant was a no-call/no-show during the entire week beginning July 2, 2012. He left Ms. Fobert a message at 10:28 a.m. on July 9, 2012 stating that he was at the Family Counseling Center and wanted the paperwork corrected to reflect the leave was for himself as well. He asked that the paperwork be sent to the attention of Tina Budraeu but she was off work until July 11, 2012. The claimant stated that he realized the paperwork was due that day but he would not be able to get it in. He wanted to make sure the paperwork was received and said he had another appointment with another therapist that afternoon.

Ms. Fobert left the claimant a message on July 10, 2012 acknowledging receipt of his message and advising him that an additional doctor's certification was sent to the Family Counseling Center. She advised him that a three-day extension was granted but stressed that it was imperative that the paperwork was received by 5:00 p.m. on Thursday, July 12, 2012. The claimant called at 10:45 a.m. on July 11, 2012 and requested the employer re-fax the additional certification as he provided the wrong fax number. The employer re-faxed the certification. The claimant called again at 10:55 a.m. and wanted it faxed again as he provided the wrong fax number again. The certification was faxed a fourth time.

The employer received the completed medical certification for the claimant on July 12, 2012 at 2:21 p.m. The doctor's certification indicated the claimant was treated on June 28, 2012. The certification required the claimant to miss work one to two days per week and he was released to return to work with no restrictions on July 16, 2012. The employer chose to excuse the claimant from work from June 28, 2012 through July 15, 2012 and approved the PLOA for that same time frame. However, since no completed doctor's certification for the claimant's son was received by the employer, the request for a PLOA based on his son's alleged medical condition was denied. No medical documentation was provided for the claimant's absences from June 13, 2012 through June 27, 2012. These absences were subject to the employer's attendance policy and led to the claimant's termination.

The employer attempted to contact the claimant at 10:00 a.m. on Friday, July 13, 2012 but could only leave a message and the claimant failed to return the call. Another message was left for him at 3:30 p.m. stating that it was imperative that he call the employer that afternoon or early Monday morning. The claimant never returned the call on Friday or on Monday. The employer reviewed the claimant's records on July 16, 2012 to determine whether he had any paid time off but he had none remaining. Consequently, the claimant's 11 days of absences were unexcused and a certified letter was sent to him terminating his employment.

The Milan Post Office received the certified termination letter sent to the claimant on July 17, 2012. The claimant left Ms. Fober a voicemail at 12:07 p.m. stating he just got done with his therapist and they wanted him to return to work. He said his cell phone was shut off and provided a new telephone number. The employer called the new number at 3:15 p.m. but could only leave a message. The claimant returned the call at 4:23 p.m. and left a voice message on Ms. Fober's line stating that he would contact the employer on the following morning. He failed to contact the employer on July 18, 2012 or thereafter.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

871 IAC 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.

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on July 17, 2012 for 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. 871 IAC 24.32(7).

The claimant missed 11 days of work without supporting medical documentation and seven of those days were no-call/no-shows. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer has met its burden. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated August 16, 2012, reference 03, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until 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 to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css