

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RAYMOND C SHERIDAN
Claimant

BLACKBIRD BEND CORPORATION
Employer

APPEAL 16A-UI-10361-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/28/16
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 § 96.3(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 September 15, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 6, 2016. The claimant participated personally. The employer participated through Lonnie Grant, human resources generalist. Employer exhibits one through six were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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?
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 was employed full-time as an overnight housekeeping supervisor and was separated from employment on June 21, 2016, when he was discharged for excessive absenteeism.

On June 1, 2016, the employer implemented a new attendance policy for employees based on a point system. Employees incurred a point each time they were absent from work, and failure to notify the employer of an absence in accordance with policy would result in an additional ½ point. Proper notification required calling the attendance hotline or security podium two hours prior to a shift start time. Upon incurring 12 points, an employee would be discharged. The claimant was aware of the employer's policy and understood the policy, as he would have to implement it with his subordinates.

Because of the claimant's prior attendance history, he began with 6 points, effective June 1, 2016. The claimant's prior attendance infractions contributing to the points included December 26, 2016, when he received a written warning for an unexcused absence. He called off work due to illness on April 17, 2016, was late on April 19, 2016, had called off due to a family emergency on May 4, 2016, called off sick on May 9, 2016, was a no call/no show due to a schedule mix up on May 30, 2016 and called off sick on May 31, 2016.

Then on June 14, 2016, the claimant called off after his start time, to report he would be absent due to illness. Because he failed to timely call off, he received 1.5 attendance points. The claimant again called off after the start time of his shift on June 15, 2016. He again received another attendance points. Then the claimant called off sick after the start time of his shifts both June 20 and June 21, 2016, incurring the claimant to receive an additional 1.5 points each day, causing to him to reach 12 points or "point out." At no time was the claimant hospitalized or incapacitated during the final four call offs, but rather he was fighting back pain, a kidney issue and subsequent stomach ailment. The claimant did not present the employer any doctor's notes at the time of the absences or thereafter, nor did he attempt to appeal his discharge with the employer. Rather, the claimant knew his shift was scheduled with extra coverage and thought the employer would recognize he was ill. He chose not to grieve the discharge because he became depressed with the discharge and gave up.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1460.00, since filing a claim with an effective date of August 28, 2016. The administrative record also establishes that the employer did participate in the September 14, 2016 fact-finding interview by way of Lonnie Grant.

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.

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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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 Dep’t of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury **must be properly reported in order to be excused**. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). (Emphasis added).

An employer’s attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. In this case, the claimant had four absences between June 14 and 21 due to illness. The claimant was aware of the employer’s notification policy which required he call off an absence two hours prior to his shift, in order for it be properly reported and to avoid an extra ½ point. The claimant was further in a management role and therefore not only knew the policy but was responsible for enforcing it amongst his subordinates. The administrative law judge is sympathetic to the claimant’s continued illness with his kidney, stomach and back, but is not persuaded the claimant was unable to properly report any of his four absences on June 14, 15, 20 or 21. As a result, even though the reasons for the absences would have been excused, the claimant’s failure to report them properly, (and in the absence of some mitigating reason such as hospitalization), result in the absences being considered unexcused for purposes of unemployment insurance law.

Even without considering the absences under the old attendance policy, the claimant incurred four unexcused absences (June 14, 15, 20 and 21) because he failed to properly report his call offs. The employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The administrative law judge therefore concludes the claimant had four unexcused absences in a three week period. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The next issue is whether claimant is overpaid benefits and must repay the benefits.

Iowa Code § 96.3(7)a-b 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) (a) 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 § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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 § 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.

(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 states pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 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 unrebutted 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 claimant has been overpaid benefits in the amount of \$1460. 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 employer will not be charged for benefits if it is determined that it 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 benefits but was not eligible for those benefits. The employer satisfactorily participated in the fact-finding interview. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The September 15, 2016, (reference 01) 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 \$1460.00, and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs