

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer at store number 1431 in Keokuk Iowa, from January 19, 2004 until he was discharged on August 8, 2005. The claimant had previously been employed by the employer but at other stores. The claimant was discharged for attendance. Immediately prior to his discharge the claimant had three tardies on July 23, 2005; August 2, 2005; and August 4, 2005. These tardies were for lack of transportation. The claimant did not drive and always walked to work. He walked two hours to work. On some days the claimant was not able to walk to the employer in sufficient time to be at work on time. The claimant could have left work earlier. The claimant did not properly report these tardies. The employer has a rule or policy covered in orientation and as shown at Employer's Exhibit One that an employee who is going to be absent or tardy must notify the employer one hour prior to the start of the employee's shift. The claimant had three additional tardies on May 31, 2005; June 27, 2005; and July 15, 2005. These tardies were for the same reasons as the previous tardies and were not properly reported to the employer. The claimant also had three other tardies on May 28, 2005; December 24, 2004; and November 27, 2004. Again these tardies were for the same reasons as the prior tardies and were not properly reported. The claimant also had an absence on February 12, 2005 that was a no-call/no-show absence. The claimant gave no reason for his absence and he did not properly report this absence. In addition to the tardies, the claimant had five absences for illness in 2005 but these were all properly reported. The claimant received a written coaching for improvement concerning his attendance on January 19, 2005 and again on February 18, 2005 as shown at Employer's Exhibit Two. The claimant was given a decision making day on February 18, 2005, to be taken on February 19, 2005. Pursuant to his claim for unemployment insurance benefits filed effective September 18, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,170.00 as follows: \$195.00 per week from six weeks for benefit week ending September 24, 2005 to benefit week ending October 29, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on August 8, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The employer's witness, Bruce Sohn, Assistant Manager, credibly testified that in a little more than eight months the claimant had nine tardies as set out in the Findings of Fact. Seven of those tardies occurred in a little more than two months before the claimant's discharge. The claimant testified that these tardies were for a lack of transportation because he walked to work and it took two hours for him to walk to work. The administrative law judge is not without sympathy for the claimant, who had to walk two hours to work, but the administrative law judge notes that the claimant was able to walk those two hours without being tardy on all the other days that he worked. The claimant testified that the weather would slow him down but most of the claimant's tardies occurred in the spring or summer. The claimant then said the heat would slow him down. However, the claimant conceded that he could have left earlier on those occasions. Later, the claimant testified that he was sick on some of these occasions. The claimant's testimony is not credible. The claimant's testimony was inconsistent

and he changed his reasons for the tardies on several occasions. The administrative law judge notes that the claimant had absences for personal illness but these are not counted against him here because they were for personal illness and properly reported. If the claimant was truly ill on those occasions when he was tardy, he should have just not gone to work and called in sick and those absences would not have established excessive unexcused absenteeism.

Mr. Sohn credibly testified that none of the claimant's tardies were properly reported, and he testified from employer records. The claimant testified that he always properly reported his tardies by calling in one hour before his shift was to start. The administrative law judge does not understand how the claimant could call in one hour before his shift for these tardies and concludes that the claimant did not properly report his tardies. Also damaging the claimant's credibility is his testimony that he was not a no-call/no-show on February 12, 2005 because that was a decision making day. The decision making day occurred on February 18 and the claimant was off on February 19. This was confirmed by Employer's Exhibit Two. The administrative law judge also concludes that the claimant was absent without properly reporting the absence and without giving a reason on February 12, 2005. The claimant did have other absences for personal illness but those were properly reported and are not considered excessive unexcused absenteeism. Nevertheless, the administrative law judge is constrained to conclude that the claimant's nine tardies and the absence on February 12, 2005 which was a no-call/no-show absence were not for reasonable cause or personal illness and not properly reported and do establish excessive unexcused absenteeism. The claimant received two written coaching for improvements for attendance as shown at Employer's Exhibit Two. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,170.00 since separating from the employer herein on or about August 8, 2005 and filing for such benefits effective September 18, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION

The representative's decision of October 5, 2005, reference 01, is reversed. The claimant, Christopher A. Hallford, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. He has been overpaid unemployment insurance benefits in the amount of \$1,170.00.

kkf/kjw