

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHIQUITA PAYTON
Claimant

APPEAL 16A-UI-07466-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHRISTIAN RETIREMENT SERVICES INC
Employer

**OC: 06/05/16
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 June 27, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 26, 2016. Claimant participated. Employer participated through director of health services Kim Bergen-Jackson. Health center coordinator Shelia McBride and human resource manager Krissy Gilbreth attended the hearing on behalf of the employer.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed part-time as a certified nursing assistant (CNA) from September 24, 2012, and was separated from employment on June 5, 2016, when she was discharged.

The employer has a written attendance policy that states anything over eight absences for full-time employees is considered excessive; there is nothing specific about part-time employees. The policy states that absences or tardiness that is excessive may be subject to disciplinary action. The employer uses progressive discipline: coaching, verbal warning, written warning, performance improvement plan, and then discharge. If an employee is going to be absent or late, they need to call two hours prior to their shift. Claimant was aware of the policies.

The final incident occurred when claimant was absent from her scheduled shift on June 5, 2016. Claimant called the employer and stated she was not going to be at work because she did not have any transportation. Claimant's babysitter was not available on June 5, 2016. Claimant's babysitter is the person that provides claimant transportation to work. Because her babysitter was not available, claimant could not leave her child and grandmother at home alone. Ms. Bergen-Jackson e-mailed claimant and told her she was discharged. Claimant apologized because she had given her word and did not follow through with it. A couple of months before, claimant told the employer that she was going to get a car with her tax return.

On July 2014, claimant received a written warning for absenteeism. Claimant was warned that four unexcused absences as a part-time employee is considered excessive. The employer had coachings with claimant about her absenteeism in October 2015 and December 2015. On February 2, 2016, the employer put claimant on a performance improvement plan. Claimant was warned that her job was in jeopardy. Claimant was having trouble getting to work on time. Most of claimant's absenteeism issues were related to transportation issues. Claimant told the employer she was going to try to use her tax return to purchase a vehicle, but it did not happen.

The employer had multiple conversations about her absenteeism. After February 2, 2016 until March 31, 2016, claimant was five or more minutes late eighteen of her twenty-two shifts and absent for three shifts. Claimant's schedule was then changed from three days a week to two days a week. From April 1, 2016, to June 4, 2016, claimant was five or more minutes late nine of her fifteen shifts and absent for three shifts. The employer did not discharge claimant for these absences, because it was waiting on claimant to get her tax return so she could get a car. Eventually Ms. Bergen-Jackson asked claimant about her getting a car and claimant stated she could not do it financially.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,260.00, since filing a claim with an effective date of June 5, 2016, for the seven weeks ending July 23, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

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 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).

An employer’s absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. On February 2, 2016, the employer put claimant on a performance improvement plan and warned her that her job was in jeopardy because of her absenteeism issues. The majority of claimant’s absences were related to transportation issues, which are considered unexcused absences. Although claimant accumulated multiple more incidents of absenteeism after February 2, 2016 and was not discharged, the employer was not acquiescing to her absences. The employer was attempting to work with claimant on her absenteeism issues because she had informed the employer she was going to get a vehicle to resolve her transportation issues once she got her tax return back. However, Ms. Bergen-Jackson eventually asked claimant about the status of her getting a vehicle and claimant responded that she could not do it financially. Then claimant’s final absence on June 5, 2016 was related to issues of personal responsibility (childcare and transportation) and thus is considered an unexcused absence.

The employer has established that claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code § 96.3(7)a-b, 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) (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 section 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 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.

(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.

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 she was not entitled. 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 they 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The June 27, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$1260.00 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.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs