

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SAUD TALAL
Claimant

APPEAL NO: 17A-UI-08070-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

YELLOWBOOK INC
Employer

OC: 07/16/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 31, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 29, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Maria Gaffney, Human Resources Generalist and Diana Rodriguez, Sales Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time telephone client services representative for Yellowbook from February 2, 2005 to July 14, 2017. He was discharged from employment due to a final incident of absenteeism that occurred July 13, 2017.

Under the employer's attendance policy, if an employee accumulates 30 hours of unpaid time off he receives a first written warning and if he accumulates an additional 16 hours of unpaid time off he receives a final written warning. If the employee accrues any further unpaid time off after the final written warning, his employment is terminated. Employees are allowed to make up two hours per day to cover their absences during the week.

The claimant received a first written warning February 13, 2017, because he had used 33.1 hours of unpaid time. He received a final written warning May 22, 2017, after he used an additional 16.34 hours of unpaid time. The claimant was told at the time of the final written warning that if he accrued any further unpaid time off that he did not make up, his employment would be terminated.

On July 10, 11 and 12, 2017, the claimant left one hour early each day. He did not make any of those three hours up. The claimant texted the employer around 10:00 a.m. July 13, 2017, two hours after the scheduled start of his shift, and said his mother was ill and none of his siblings were available to care for her. He stated his sister would be back in town later that afternoon but he would not be able to make it to work that day. He indicated he understood his attendance situation. The claimant was absent eight hours which he could not make up before the end of the week. When he texted his manager July 13, 2017, she suggested he contact human resources to ask about a possible leave if his mother was going to require further assistance from the claimant. The manager provided him with the name and phone number of the human resources employee and the claimant indicated he would call her. When the claimant reported for work July 14, 2017, the employer met with him to discuss his attendance and the fact he exceeded the allowed number of unpaid hours. The employer asked the claimant if he contacted human resources and the claimant stated he did not do so. The employer offered him the opportunity to go speak to human resources at that time but the claimant declined. The employer notified the claimant his employment was terminated July 14, 2017.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,275.00 for the five weeks ending August 19, 2017.

The employer did not participate in the fact-finding interview. Talx provided the name of one of its employees, Tilinia Davidson, to participate but when the fact-finder tried to call Ms. Davidson for the 8:15 a.m. interview she could only leave a voice mail message. The employer's first-hand witness, Human Resources Generalist Maria Gaffney, called and left a message with one of the Department's customer service representatives indicating she wished to participate in the fact-finding at 8:49 a.m. The fact-finder called her back at 4:14 p.m. but the employer's phones were down.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

The claimant used his four personal days for the year before February 13, 2017, and demonstrated a pattern of using the three hours and five minutes of vacation he earned each pay period during the following pay period and when that ran out he used unpaid time off. Consequently, he did not build up any vacation time or save any personal days to cover an unexpected absence. Between May 22 and July 10, 2017, he made up the time he missed coming in late and leaving early during each week, in accordance with the employer’s policy. He left one hour early July 10, 11 and 12, 2017, without making the time up and was absent July 13, 2017, and did not have any vacation or personal days left to cover his absences.

The employer has established that the 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 the claimant’s history of absenteeism, is considered excessive. Therefore, benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer’s account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The employer did not participate in the fact-finding through no fault of its own. Although the fact-finder initially had the incorrect name and telephone number of the employer’s participants, when the employer’s witnesses did not receive a telephone call from the fact-finder it called the Department and left a message with the correct names and telephone numbers of the participants at 8:49 a.m. Whether the fact-finder did not get the message until later in the day or simply neglected to call that number until 4:14 p.m., the employer’s phone system went down at approximately 2:00 p.m. and consequently it was unable to participate in the fact-finding interview despite being willing and able to do so the morning the fact-finding was scheduled. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer cannot be penalized for failing to participate in the fact-finding interview under these circumstances. Therefore, the claimant’s overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,275.00 for the five weeks ending August 19, 2017.

DECISION:

The July 31, 2017, reference 01, 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's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,275.00 for the five weeks ending August 19, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn