

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ROBERT A SLAVISH
Claimant

WATERPARK LC
Employer

APPEAL 16A-UI-08620-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/26/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 August 2, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 25, 2016. The claimant participated personally, and was represented by Shea Porter, hearing representative. The employer participated through Josh Green, regional manager. Employer exhibit 1 was admitted 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 worked during two periods of employment, and the most recent period of employment began October 25, 2015. The claimant was employed part-time as a laborer/washer and was separated from employment on June 11, 2016, when he was discharged by Josh Green.

The undisputed evidence is that the claimant was discharged on June 11, 2016 after reporting an absence due to being sick on June 10, 2016. According to the employer, the claimant had a history of not working his shifts, leaving early, and calling off repeatedly. The employer could not provide any specific dates or incidents but said it was because the claimant was tired, didn't want to work or felt sick, when he would miss work. The claimant asserted that when weather was uncooperative or slow and work was unavailable or the employer offered to send people

home, that he obliged, but that he had two call outs for full days of work; once in January after he hit his head at home and wanted to go to the doctor, and again on June 10, 2016, when the claimant was vomiting. The claimant was advised on June 10, 2016, that he was required to bring a doctor's note in to excuse his absence, and the claimant informed the employer he could not go to the doctor because he did not have insurance. Upon arriving to work on June 11, 2016, the claimant attempted to tender his resignation but the employer reported the decision had been made to discharge him based on June 10, 2016, so he was discharged by Mr. Green instead.

Prior to discharge, the claimant had no written warnings, and denied knowing his job was in jeopardy. The employer reported it had warned the claimant repeatedly verbally but could not verify dates or details. The employer reported the claimant was also warned after taking an extended lunch on January 6, 2016 and for poor quality service on April 24, 2016, when the claimant was reportedly sent home from work. The claimant denied receipt of any warning or discipline related to those incidents and no written documentation was furnished for the hearing reflecting the claimant's receipt of warnings or suspensions.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$952.00, since filing a claim with an effective date of June 26, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview with the claimant but separately, on July 20, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical

documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

An employer's absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. The credible evidence presented in this case is that the claimant was discharged following his absence, which he personally reported to the employer, on June 10, 2016. The reason the claimant missed work was due to vomiting. He did not go to a doctor because he did not have insurance and told the employer he could not afford a doctor's appointment. The only other absence the claimant had was in January 2016, when he called off work to visit a doctor after a head injury. The employer alleged the claimant was absent every week but could not furnish dates, specific incidents, or other details. Further, no documentation was furnished that the claimant was ever warned about his absences.

The administrative law judge finds the evidence of the claimant to be more persuasive and credible than the employer due to the specificity and consistency of statements made. Besides the two occurrences related to illness and a head injury, the credible evidence presented establishes that other work missed was due to a lack of work or initiated by the employer due to weather or slow service. The employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Since the claimant is eligible for benefits, the issue of recovery of any overpayment and relief of charges are moot.

DECISION:

The August 2, 2016, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed provided he is otherwise eligible. The claimant has not been overpaid unemployment insurance benefits. The employer's account shall be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs