

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BOBBIE SANDERS

Claimant

APPEAL NO: 13A-UI-11814-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE AMERICAS TIRE

Employer

OC: 10/21/12

Claimant: Respondent (2)

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Bridgestone Americas Tire (employer) appealed an unemployment insurance decision dated October 10, 2013, reference 01, which held that Bobbie Sanders (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 13, 2013. The claimant participated in the hearing. The employer participated through Jim Funcheon, Divisional Human Resources Manager and Jeff Higgins, Labor Relations Manager. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issues are whether the claimant is disqualified for benefits, whether she was overpaid unemployment insurance benefits, whether she is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time production worker from August 3, 1998 through September 23, 2013. She was discharged from employment due to violation of the employer's attendance policy with a final incident on August 30, 2013 when she was a no-call/no-show. The employer's attendance policy is provided in the union contract and all employees have access to this information. After five incidents, an employee is placed on Step One, the next incident results in Step Two, another incident results in Step Three and the final incident results in Step Four or termination. If the employee goes nine months without an incident, they are reduced one step.

The claimant was placed on Step One on July 25, 2012; Step Two on September 17, 2012; and Step Three on March 19, 2013. She was a no-call/no-show on August 30, 2013. The claimant had signed up for overtime on August 27, 2013 and August 30, 2013 and was approved for the

overtime. The overtime sheets are posted on a weekly basis and an employee is responsible for working the overtime if they request it and are subsequently approved for it. The claimant worked August 27, 2013 but failed to show for the second day of overtime.

The claimant was absent for medical reasons from September 1, 2013 through September 13, 2013. After she returned to work, the labor relations manager questioned her about the final absence but she denied signing up for overtime. The manager ended the meeting until he could obtain the overtime sign-up sheet from the department foreman. Once the manager obtained this sheet, he saw the claimant had signed up for the overtime and was approved for it. She met with the manager again September 19, 2013 and was suspended. Termination occurred on the following week.

The claimant filed a claim for unemployment insurance benefits effective October 21, 2012 and has received benefits after the separation from employment in the amount of \$1,796.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on September 23, 2013 for 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. 871 IAC 24.32(7).

The Iowa Supreme Court in the case of *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct and includes tardiness, leaving early, etc. The Court in the case of *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of "personal responsibility such as transportation problems and oversleeping are considered to be unexcused."

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.

The only remaining issue to be determined is whether the claimant was discharged for a current act. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

The claimant's final absence was August 30, 2013 but she was absent after that for medical reasons from September 1, 2013 through September 13, 2013. After she returned to work, the labor relations manager questioned her as to her final absence. The claimant denied signing up for the overtime and the manager had to investigate the matter since he did not have the overtime sheet with him. Within two days, he obtained the overtime sheet which confirmed the claimant did sign up for overtime and was approved for overtime. The claimant was then suspended until her date of termination. Consequently, her discharge was for a current act and benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits she has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, a waiver cannot be considered because both parties participated in the fact-finding interview. See 871 IAC 24.10. Its account is not subject to charge and the claimant is responsible for repaying the overpayment amount of \$1,796.00.

DECISION:

The unemployment insurance decision dated October 10, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,796.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs