

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUTH C RODRIGUEZ
Claimant

APPEAL NO. 15A-UI-00815-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA STAFFING INC
FRANK TURSI
Employer

OC: 07/20/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Iowa Staffing, Inc. filed a timely appeal from a representative's decision dated January 16, 2015, reference 03, which held claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed from work for excessive absences but finding that the claimant's absences were due to illness and properly reported. After due notice was provided, a telephone hearing was scheduled for and held on February 12, 2015. Although Ms. Rodriguez provided a telephone number where she could be reached for the hearing, the claimant was not available at the telephone number provided and repeated messages were left for the claimant. The employer participated by Ms. Alejandra Rocha, Office Manager. Employer's Exhibits A, B, and C were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ruth Rodriguez was employed by Iowa Staffing, Inc. from September 23, 2014 until December 19, 2014 when she was discharged for excessive unexcused absenteeism. Ms. Rodriguez was assigned to work as a full-time production/packaging worker at the Maretti Frozen Pasta Company and was paid by the hour. The claimant's contact person at Iowa Staffing, Inc. was Ms. Alejandra Rocha.

Iowa Staffing, Inc. attendance policy specifically requires employees to first notify Iowa Staffing, Inc. of any impending absences and requires employees assigned to client locations to then also notify the client employer if they are going to be absent from work. Ms. Rodriguez was aware of the policy and had acknowledged it during orientation. After beginning her assignment at Maretti Frozen Pasta, Ms. Rodriguez followed the company's attendance policy by notifying both Iowa Staffing, Inc. and Maretti Frozen Pasta if she was going to be absent from work.

During the course of her employment with Iowa Staffing, Inc., Ms. Rodriguez called off work on August 7, 13, and September 25, stating that she was sick. After those dates, the claimant discontinued notifying Iowa Staffing, Inc. of impending absences. On December 19, 2014, the company was notified by Maretti Frozen Pasta that the client/employer no longer wished to have Ms. Rodriguez assigned to them because she had been excessively absent. At that time, Iowa Staffing, Inc. learned that Ms. Rodriguez had continued to be absent from work on a number of occasions without notifying Iowa Staffing, Inc. that she was going to be absent as required by policy.

Iowa Staffing, Inc. was informed by the client that Ms. Rodriguez had called off work on November 19 and December 1 giving no reason and that the claimant had called off sick on December 2 and 3, 2014. The client further reported that Ms. Rodriguez had left early on December 8 and that she had failed to report and provided no notification to the client on December 12, 2014. The claimant had then called off work on December 14 giving no reason. Claimant's final absence at the client/employer location was on December 19, 2014 when Ms. Rodriguez stated to the Maretti Frozen Pasta Company that she was having a "family emergency." Iowa Staffing concluded that the claimant had been excessively absent and that on the last eight occasions the claimant had not notified Iowa Staffing, Inc. of her impending absences as policy requires. Claimant was contacted by Iowa Staffing, Inc. and had no explanation for her failure to follow the notification procedures.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

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(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

In discharge cases the employer has the burden of proof to establish disqualifying conduct on the part of the claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences for reasons such as transportation or oversleeping or other matters of personal responsibility are considered unexcused. Absences related to illness or injury are considered excused providing the employee has complied with the employer's policy of notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Ms. Rodriguez did not follow the employer's attendance policy in connection with her absences on November 19, December 1, 2, 3, 8, 12, 14 and December 19, 2014. The policy required personal notification from the claimant to Iowa Staffing, Inc. for each absence. Ms. Rodriguez was aware of the policy and had initially followed it. After September 25, 2014, the claimant chose not to notify Iowa Staffing, Inc. if she was going to be absent at the client location although she was aware that she was required to do so. Ms. Rodriguez's decision to forgo notification with Iowa Staffing, Inc. to notify them impending absences was unreasonable. Based upon Ms. Rodriguez's failure to properly notify the temporary employment services of her absences as required, the claimant's absences were unexcused absences and were excessive. The claimant's excessive, unexcused absences constitute misconduct in connection with the employment.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Ms. Rodriguez was discharged for misconduct.

Accordingly, the claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided that she is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects the claimant has received unemployment insurance benefits in the amount of \$730.00 since filing a claim with an effective date of July 20, 2014 for the week ending dates January 10, 2015 through February 7, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview or make a firsthand witness available for rebuttal.

Iowa Code § 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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 they did participate in the fact-finding interview. Iowa Code section 96.3(7). 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, claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The representative's decision dated January 16, 2015, reference 03, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. Claimant has been overpaid benefits in the amount of \$730.00. Since the employer did participate in the fact-finding interview, claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs