

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ALEN PAJAZETOVIC
Claimant

GRAY TRANSPORTATION INC
Employer

APPEAL 16A-UI-06053-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/01/16
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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 May 23, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 16, 2016. Although properly notified for the hearing, the claimant did not furnish a phone number for himself or representative to participate. The employer participated through Darrin Gray. Employer Exhibits one through three were admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents. Based on the evidence, the argument 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 was employed full-time as a dedicated local driver and was separated from employment on May 4, 2016, when he was discharged for excessive absences.

Prior to discharge, the claimant had received a verbal warning for a no-call/no-show on April 16, 2016. The claimant then received a final verbal warning on April 29, 2016 in response to another no-call/no-show on April 28, 2016. The claimant was made aware that his job was in jeopardy based on his history of no-call/no-shows when he felt tired or overworked. The employer also informed all staff in a meeting that due to working a "skeleton crew", all staff were needed to be at work when scheduled. The employer's policy required the claimant to call to

notify the employer ½ to 1 hour prior to the start of his 7:00 a.m. shift. The final incident occurred on May 4, 2016 when the employer received a phone call from a client that the claimant had not arrived for his shift to drive. Mr. Gray tried to call the claimant and received no answer, and then went to check for the claimant in the shop. Around 7:30 a.m., the claimant text messaged his manager to report the absence stating he was tired and his arm hurt. Mr. Gray called him and discharged him.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,970.00, since filing a claim with an effective date of May 1, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The administrative record reflects the fact-finding interview was scheduled and conducted on May 20, 2016 around 1:10 p.m. The employer reported there were two notices of fact-finding interviews sent with conflicting dates and Mr. Gray missed the call for the first scheduled fact-finding interview, but returned the call after the interview occurred. The administrative record does not reflect that two notices were mailed.

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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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). (Emphasis added)

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. After carefully reviewing all of the evidence in this case, the administrative law judge concludes that the employer has shown excessive unexcused absenteeism. Over a period of three weeks, the claimant had three no-call/no-shows, which were unexcused absences, inasmuch as the claimant did not report his absences prior to his shift, nor was any evidence furnished that he was physically incapable of notifying the employer. Further, the credible evidence establishes that the claimant was issued two warnings including a final verbal warning on April 29, 2016 with regard to his attendance, and could have reasonably anticipated his job was in jeopardy based on the warning a week prior to discharge, as well as training by the employer. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The next issue is whether the claimant is overpaid benefits and must repay the benefits.

Iowa Code § 96.3(7)a-b 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 § 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 § 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 § 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 he was not entitled. The claimant has been overpaid benefits in the amount of \$1,970.00. 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. Based on the administrative record and evidence presented, the administrative law judge is not persuaded the employer satisfactorily participated in the May 20, 2016 fact-finding interview. Therefore, the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The May 23, 2016, (reference 01) unemployment insurance 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 has been overpaid benefits in the amount of \$1,970.00 but does not have to repay the benefits. The employer's account is not relieved of charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs