IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFFREY L CAMPBELL
Claimant

OMAHA STANDARD LLC
Employer

APPEAL NO. 14A-UI-06981-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/08/14
Claimant: Respondent (2)

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.3(7) – Overpayment and Employer Participation in Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 26, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged for no disqualifying reason on May 16, 2014. After due notice was issued, a hearing was held on July 29, 2014. Claimant Jeffrey Campbell participated. Thomas Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Susan Bishop and Rachel Prucha. Exhibits One through Six were received into evidence. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding within the meaning of the law.

ISSUES:

Whether Mr. Campbell separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether Mr. Campbell has been overpaid unemployment insurance benefits.

Whether Mr. Campbell is required to repay benefits.

Whether the employer's account may be charged for benefits already paid to Mr. Campbell or for future benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeffrey Campbell began his full-time employment with Omaha Standard, L.L.C., in 1994 and last performed work for the employer on March 13, 2014. Mr. Campbell's work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Campbell's immediate supervisor was Daniel Wells, Production Supervisor.

In January 2014, Mr. Campbell applied for and was approved for intermittent medical leave under the Family and Medical Leave Act (FMLA). The medical certification for the leave indicated that the need for leave was based on Mr. Campbell experiencing shortness of breath and joint pain. Mr. Campbell's doctor indicated in the medical certification that Mr. Campbell's shortness of breath and joint pain were chronic medical conditions. Mr. Campbell's doctor indicated that Mr. Campbell would need to miss work one time every two months and might need to miss up to five days of work at that time.

The employer's attendance policy requires that an employee who needs to be absent from work call in each day of the absence no later than one hour after the scheduled start of the shift. The policy requires that the employee leave a message that indicates the employee will be gone that day, and the reason for the absence. The call-in requirement applies to all employees, including those approved for FMLA. Such employees need only mention FMLA when indicating the reason for the absence. Mr. Campbell was aware of the absence notification requirement.

Between Monday, March 17, 2014 and March 21, 2014, Mr. Campbell called in each day within the required timeframe and left a message indicating he would be absent due to FMLA. Mr. Campbell had previously missed no more than two consecutive days of work in connection with the intermittent FMLA leave that had been approved in January 2014. Mr. Campbell's absence for five consecutive days at work did not constitute intermittent leave and represented a change in the pattern of absences.

On March 19, 2014, Rachel Prucha, Human Resources Assistant, spoke with Mr. Campbell by telephone about his ongoing absence from work that week. Mr. Campbell told Ms. Prucha that he was experiencing a flare-up and would try to come to work the next day. Mr. Campbell did not return to work the next day. Mr. Campbell called in additional absences on March 24, 25, and 26 2014. For each day, Mr. Campbell called within the required timeframe and left a message indicating he would be absent due to FMLA.

On March 26, 2014, Ms. Prucha spoke with Mr. Campbell by telephone about his continued absence from the workplace. Ms. Prucha told Mr. Campbell that it looked like his medical situation had changed due to the number of flare-ups Mr. Campbell's absences suggested he was experiencing. Ms. Prucha asked Mr. Campbell to come to the workplace and collect a new medical certification form for ongoing FMLA leave. Ms. Prucha also asked Mr. Campbell to collect an application for short-term disability so that he would have some income while he was off work. If Mr. Campbell was approved for the short-term disability, under the employer's work rules the employment would be protected during a leave of up to a year. Mr. Campbell told Ms. Prucha that he would come in on or around March 31, 2014 to collect the FMLA certification paperwork and the short-term disability application paperwork. Mr. Campbell did not go to the workplace on March 31, 2014 to collect the paperwork. Instead, Mr. Campbell continued to call in each day within the required timeframe and continued to report that he would be absent due to FMLA.

On April 3, 2014, Ms. Prucha sent Mr. Campbell a letter by certified mail. Mr. Campbell had continued to call in daily absences within the required timeframe and had continued to reference FMLA as the basis for the absences. In her letter to Mr. Campbell, Ms. Prucha stated as follows:

> Recently, I have reached out to you about your FMLA coverage and that we as a company understand that medical condition can change and that we are generally concerned about your health. I requested that you stop in and pick up short-term disability paperwork and new FMLA medical certification paperwork from [for] your

> doctor stating any changes to your medical condition and frequency of flareup's. Currently your doctor states that you are approved for flare-up's of one time every two months and duration of related incapacity being up to five days per episode. You stated that she would stop in on or about March 31 and I have not seen you yet. You have been out of work since March 14 and we need an update on the status of your current medical condition. In order to provide further job protection, we need you to pick up new FMLA medical certification paperwork by April 11, 2014.
>
> I have attached your FMLA medical certification that we received in January 2014. Please contact me to set up a time for you to come in and pick up required paperwork.

Mr. Campbell did not take any immediate action in response to the letter he received on April 8, 2014. Instead, Mr. Campbell continued the same pattern of calling in FMLA absences each day within the required timeframe.

On April 18, 2014, Ms. Prucha sent Mr. Campbell a second letter by certified mail. Mr. Campbell received the letter on April 22, 2014. In that letter, Ms. Prucha wrote as follows:

> The purpose of this letter is to notify you that I had reached out to you previously, by sending you a certified letter dated April 3rd 2014, which you received on April 8, 2014. In that letter we had requested that you stop into Omaha Standard Palfinger's Human Resources Department by April 11th 2014 to pick up FMLA paperwork to update us on your condition as it appears that it has changed and we are in need of an updated medical certification. However, we have not spoken with you since March 26th, 2014. Omaha Standard Palfinger requires all of its employees to keep updated FMLA paperwork that covers their current medical condition and necessity for leave. While we appreciate the fact that you have been calling in regularly as required, it is important that we speak with you regarding this matter.
>
> We have also attempted several other times to reach you by phone and have been unsuccessful. Unless you have gotten in touch with us or stop in by **April 30th, 2014**, we will be forced to issue you attendance points for your absences.

On April 23, 2014, Mr. Campbell reported to the workplace and collected the FMLA medical certification form and the short-term disability application paperwork. Ms. Prucha told Mr. Campbell that the updated FMLA certification was due on May 9, 2014. Ms. Prucha also wrote the May 9 due date on the FMLA medical certification form. At the time of the contact on April 23, Mr. Campbell asserted that his doctor had not put all of the relevant medical facts on the FMLA medical certification submitted in January. Mr. Campbell did not go into medical condition information that he believed his doctor had omitted from the FMLA certification submitted in January 2014. Mr. Campbell did not follow through with submitting an updated FMLA certification or an application for short-term disability benefits. Mr. Campbell continued the same pattern of calling in absences each day in the required timeframe and continued to report that the absences were due to FMLA. Mr. Campbell last called in an absence on May 16, 2014 and did not report any additional absences thereafter.

On May 12, 2014, Ms. Prucha sent Mr. Campbell another certified letter. Mr. Campbell received the letter on May 17, 2014. In the letter, Ms. Prucha stated as follows:

> Recently, you had stopped into the OSP HR Department, per my request, on April 23rd, 2014 and picked up new FMLA medical certification paperwork and were informed that it was due back no later than May 9, 2014 (15 days from the time of the FMLA request). I

> wrote the date at the top of your Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), that the due date was May 9th. Since it was not returned by the due date, and there was no communication with the HR department, we are going to deny your FMLA leave.
>
> We as a company understand that your medical condition can change however we have given you several opportunities to bring in a newly updated medical certification for FMLA and we in fact also gave you short-term disability paperwork to get filled out and returned to us and neither have been returned. At this time, we are going to have to start assessing you points for the Omaha Standard Palfinger contract, per every day missed. If you have any questions, please feel free to contact either myself or Michelle Hawkins at 712-256-9330.

The employer assessed Mr. Campbell two attendance points for each day between May 13 and 16, 2014. The employer assessed a total of eight attendance points, which would subject Mr. Campbell to discharge from the employment under the employer's attendance policy.

Mr. Campbell was hospitalized on May 18, 2014. Prior to that, Mr. Campbell had not been to see a doctor since the first week of January 2014. Mr. Campbell was discharged from the hospital on June 3, 2014. Mr. Campbell had his mother check his house and mail while he was hospitalized.

On May 20, 2014, Ms. Prucha sent Mr. Campbell a final letter by certified mail. Mr. Campbell's mother accepted service of the letter on June 3, 2014 and promptly provided it to Mr. Campbell. In the letter, Ms. Prucha stated as follows:

> Our records indicate that you were absent from work 5/13/2014 through 5/16/2014, accruing 2 points per day resulting in over 8 attendance points total from June 2013 until current.
>
> Those individuals who have been assessed points under their [the] attendance policy will be subject to the following progressive discipline procedure unless otherwise described in our policy:
>
> *Per our no-fault attendance policy, upon accumulation of eight (8) points, the employee will be terminated.*
>
> I had recently reached out to you by certified letter on May 12, 2014 and have not had direct contact with you since. Therefore your employment with Omaha Standard Palfinger has been terminated effective immediately.

Though Mr. Campbell had been discharged the hospital on June 3, the same day he received employer's letter of May 20, he did not make any contact with the employer in response to receiving the letter.

Mr. Campbell established a claim for unemployment insurance benefits that was effective June 8, 2014. Mr. Campbell has so far received $3,264.00 in benefits for the period of June 8, 2014 through August 2, 2014.

On June 25, 2014, an Iowa workforce development claims deputy held a fact-finding interview to make the initial determination regarding Mr. Campbell's eligibility in the employer's liability for benefits in connection with the separation from the employment. Susan Bishop of Equifax

Workforce Solutions, the employer's representative of record, represented the employer at the fact-finding interview. Ms. Bishop did not have any personal knowledge concerning Mr. Campbell's employment or his separation from the employment. At the time of the fact-finding interview, Ms. Bishop provided a summary statement to the claims deputy indicating that Mr. Campbell had been discharged for no-call, no-show absences between May 13 and May 16, resulting in eight attendance points being assigned to the absences and subjecting Mr. Campbell to discharge from the employment. The statement that there had been no-call, no-show absences between May 13 and May 16 was erroneous. The employer representative had provided an electronic protest of the claim and that information was also considered by the claims deputy at the time of the fact-finding interview. That documentation indicated that Ms. Prucha had discharged Mr. Campbell for being a no-call, no-show May 13 through May 16, and that this had subjected Mr. Campbell to discharge under the employer's attendance policy. The claims deputy's notes indicate that Ms. Bishop advised at the time of the fact-finding interview that she would be faxing additional documentation for consideration by the claims deputy. Ms. Bishop faxed the documentation the next morning. The additional documentation included the documents that were received into the appeal hearing record as Exhibits One through Six. There is no indication in the administrative file documenting the claims deputy's receipt of the additional documentation. The claims deputy left blank that portion of the fact-finding cover sheet where the claims deputy was to note whether the employer participated in the fact-finding interview. Indeed, the claims deputy left much of the coversheet blank.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

Despite Mr. Campbell's failure to respond to the employer's repeated requests for an updated FMLA medical certification, Mr. Campbell continued to be absent due to illness and continued to properly report his absences during the period of March 17, 2014 through May 16, 2014. The daily contact indicates a desire to preserve the employment relationship and does not indicate a voluntary quit. Iowa Administrative Code rule 871-24.25(4) recognizes a presumption of a voluntary quit without good cause attributable to the employer where an employee is absent for three days without properly notifying the employer. Mr. Campbell has just one day, May 19, 2014, when he was absent without notifying the employer before the employer sent the termination letter. Mr. Campbell had been hospitalized on May 18. The single no-call, no-show absence would not be sufficient to create the presumption of a quit.

The weight of the evidence establishes that Mr. Campbell was discharged from the employment through the employer's letter of May 20, 2014.

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 related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). In Gaborit, the court held that an employee's failure to provide a doctor's note in connection with an absence that was due to illness and that properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557. The court stated as follows:

> Because the Iowa Code and the Iowa Administrative Code define unexcused absences for unemployment compensation purposes, our remaining question is whether Ms. Gaborit's absence was unexcused within the meaning of the statutes. Because the statutes exclude properly reported absences due to illness from the definition of unexcused absences, and Ms. Gaborit was ill and properly reported her absence, we hold that her final absence was excused as a matter of law. Ms. Gaborit is not disqualified for benefits due to misconduct.

Gaborit, 743 N.W.2d at 558. Pursuant to the Iowa Court of Appeals' reasoning and holding in Gaborit, the administrative law judge would have to conclude that Mr. Campbell's absences during the period of March 17, 2014 through May 16, 2014 were excused absences under the applicable law. To the extent that the discharge was based on attendance, the discharge was for no disqualifying reason. However, that is not the end of the story.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer's March 19, 2014 request for updated medical certification was unreasonable. The employer had on hand a medical certification for intermittent leave that stated Mr. Campbell might need to be gone for up to five days at a time in connection with his chronic illness. As of March 19, Mr. Campbell had only been gone three days, including March 19. Given the prolonged absence that followed, the employer's subsequent repeated requests for updated medical certification to clarify and support Mr. Campbell's ongoing need to be absent from the employment were reasonable. Mr. Campbell ended up being gone for far more than the maximum five days per incident referenced by his doctor in the January certification. Mr. Campbell's ongoing conduct in failing to provide the requested updated medical information, and his repeated failure to respond in a meaningful way to the employer's letters, was unreasonable. Mr. Campbell's repeated refusals, indicated through his interaction on the employer's requests, constituted insubordination and misconduct in connection with the employment. The evidence in the record indicates that the discharge was based as much on Mr. Campbell's insubordination as on the actual absences. Based on the pattern of insubordination, the administrative law judge concludes that Mr. Campbell was discharged from the employment for misconduct that disqualifies him for unemployment insurance benefits

Mr. Campbell is disqualified for benefits until 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 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 § 96.3-7-a, -b.

Mr. Campbell received benefits but has been denied benefits as a result of this decision. Accordingly, Mr. Campbell has been overpaid $3,264.00 in benefits for the period of June 8, 2014 through August 2, 2014.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews.
> 24.10(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.

Given the claims deputy's notation, in two places, that the employer representative would be submitting additional documentation, and despite documentation in the administrative file that such additional documentation was received, the administrative law judge concludes there is sufficient available evidence to establish that Ms. Bishop did in fact provide the requested documentation on the morning on June 26, 2014 before the decision allowing benefits was mailed to the parties on June 26, 2014. Those written materials were detailed in nature and supplemented the verbal and statement and cursory documentation provided on June 25, 2014. The employer's information, if unrebutted was sufficient to establish misconduct in connection with the employment. The administrative law judge concludes that the employer did participate

in the fact-finding interview within the meaning of the law. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The claims deputy's June 26, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment on May 20, 2014. The claimant is disqualified for benefits until he has worked in and been paid wages equal to 10 times his weekly benefit amount. The claimant would also have to meet all other eligibility requirements. The claimant was overpaid $3,264.00 in benefits for the period of June 8, 2014 through August 2, 2014. The claimant must repay that amount. The employer's account will not be charged for benefits already paid or for future benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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