

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**DANIEL P COTTERILL**  
Claimant

**THE UNIVERSITY OF IOWA**  
Employer

**APPEAL 14A-UI-03273-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/23/14**  
**Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the March 18, 2014, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on April 17, 2014. Claimant participated. Employer participated through Benefits Specialist Mary Eggenburg, Captain Ian Scott and Associate Director of Police Lucy Wiederholt. The administrative law judge took official notice of the administrative record, including the fact-finding interview documentation.

**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: Claimant was employed full-time as a police officer from June 29, 2009, and was separated from employment on February 3, 2014. On December 30, 2013, claimant accepted an overtime shift scheduled on January 13, 2014, from 3:00 a.m. to 7:00 a.m. His assignment was confirmed by e-mail. He failed to report as scheduled. About a year earlier his physician prescribed him sleep aid medication Ambien as needed during a stressful divorce. He usually took a half tablet, which made him sleep for six hours, but mistakenly took a whole tablet at 10:00 p.m. He had no recollection of the events after he took the pill until he was awakened by supervisor Lieutenant Lang knocking on his door. At the investigation meeting with Lang and his union representative he said he thought the overtime shift was for a different day.

He was suspended without pay for 40 hours on December 17 and 20, 2013, and January 3 and 6, 2014, for an incident of tardiness on November 3, 2013. He had overslept in part because of the daylight savings time change and having taken the sleep aid, but did not

mention medication to the employer as a reason. On May 4, 2013, he was a no-call/no-show for his 7:00 a.m. shift and received a one-day suspension without pay. He was ill and had taken the sleep aid but was hoping to report for work. He woke up during the night and fell asleep on the sofa so did not hear the alarm in the other room.

He did not notify Scott about his medical condition resulting in oversleeping, confusion, and loss of memory until January 16, 2014, when he also began investigating side effect issues with his doctor. He had told supervising lieutenants who referred him to the university health department for personal stress related health problems.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,696.00, since filing a claim with an effective date of February 23, 2014, for the four weeks ending March 1, 2014. The administrative record also establishes that the employer did participate in the fact-finding interview.

### **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 section 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.

871 IAC 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." 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 properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Absences related to lack of childcare are generally held to be unexcused. *Harlan v. Iowa Dep't of Job Serv.*, 350 N.W.2d 192 (Iowa 1984). However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v.*

*Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

Claimant's credibility is tested by the differing reasons he offered during the two investigation interviews about his failure to report for the January 13, 2014, overtime shift. Since claimant's prescription was a year old and he had multiple similar absences, including another no-call/no-show, his delayed medication side effect investigation with his physician only after the last absence was either not reasonable or not credible. While claimant's failure to report his absence may be considered excused because of the medication side effect, five hours before his shift start time and intending to report for the overtime shift, although mistakenly ingesting a whole pill, he deliberately intended to take a half pill knowing it would make him sleep for six hours. Thus the final absence was not excused as he knew or reasonably should have known before taking the pill that he would sleep at least an hour beyond the shift start time. The employer has established that the claimant was warned, and even disciplinarily suspended, 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 unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code section 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.

871 IAC 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 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). 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 the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The March 18, 2014, (reference 01) decision is reversed. 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 unemployment insurance benefits in the amount of \$1,696.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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