

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ASHLEY CLENDENEN

Claimant

WHIRLPOOL CORPORATION

Employer

APPEAL 21A-UI-20314-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/13/20

Claimant: Respondent (2)

Iowa Code § 96.5(1) – Voluntary Quit
Iowa Admin. Code r. 871-24.26(4) – Intolerable working conditions
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Whirlpool Corporation, filed an appeal from the September 1, 2021, (reference 01) unemployment insurance decision that granted benefits based upon her voluntary resignation. The parties were properly notified about the hearing. A telephone hearing was held on November 3, 2021. The claimant did not participate. The employer participated through Human Resources Specialist Colin Evers. Official notice was taken of the agency records. No exhibits were received into the record.

ISSUES:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

Whether the claimant was overpaid regular benefits? Whether the claimant is excused from repayment of benefits due to inadequate participation?

Whether the claimant has been overpaid Federal Pandemic Unemployment Compensation benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as an assembler from July 21, 2016, and was separated from employment on March 17, 2020, when she was discharged. The claimant's immediate supervisor was Kandon Hathoaway.

The employer has an attendance policy that is contained in its employee manual. Employees are instructed to inform the employer of an anticipated absence through a designated phone line at least half an hour before their shift. A full day absence counts as one occurrence. Being tardy

or leaving early counts as half of an occurrence until the duration exceeds half of the employee's shift, in which case it would count as one point. Each employee is given five absences that do not count towards discipline. After using all five of those absences, the employee receives the following discipline after accruing the corresponding number of occurrences: first written warning (one), second written warning (two), and termination (three). The attendance policy is in the collective bargaining agreement and in the employee manual. It is also reviewed with each employee during their onboarding.

The employer also has an unwritten practice that states if an employee is absent without providing proper notification for three consecutive shifts, then it is considered job abandonment.

On February 4, 2020, the claimant called in prior to the start of her shift stating she would not be working her scheduled shift on that day. The claimant did not provide any justification for her absence on that day.

On February 6, 2020, the claimant was issued a first written warning for the attendance incident that occurred on February 4, 2020.

On February 19, 2020, the claimant called in prior to the start of her shift stating she would not be working her scheduled shift on that day. The claimant did not provide any justification for her absence on that day.

On March 4, 2020, the claimant was issued a second written warning for the attendance incident that occurred on February 19, 2020.

On March 12, 2020, the claimant was scheduled to work. The claimant did not arrive at work. The claimant did not call in prior to the start of her shift with proper notice.

On March 16, 2020, the claimant was scheduled to work. The claimant did not arrive at work. The claimant did not call in prior to the start of her shift with proper notice.

On March 17, 2020, the claimant was scheduled to work. The claimant did not arrive at work. The claimant did not call in prior to the start of her shift with proper notice.

On March 17, 2020, Human Resources Operations Senior Specialist Eric McGarvey made the decision the claimant had abandoned her position because she was absent without giving notice prior to the start of her shift for three consecutive days.

The following section contains the findings necessary for the overpayment issue:

The administrative record KFFD shows a notice of fact finding was sent to the parties on August 11, 2021 informing them of a fact finding interview occurring on August 31, 2021 at 9:45 a.m. The notes appear to indicate Katie Spriggs participated on behalf of the employer. Mr. Evers is not familiar with that name or the number provided by the fact finder. Ms. Sprigg's telephone number appears to be from New Jersey. The employer appears to have registered another number originating from Michigan. The administrative records do not reflect a fact finding questionnaire was provided by the employer. There is not a summary investigative report in Alfresco.

After the claimant separated from employment, the claimant filed for regular unemployment insurance benefits and received benefits from the week ending April 4, 2020 to the week ending September 26, 2020 for a total of \$15,918.00.

The claimant also received Federal Pandemic Unemployment Compensation benefits from the week ending April 4, 2020 to the week ending July 25, 2020 for a total of \$10,200.00 in FPUC benefits.

In her 2021 claim year, the claimant filed for regular unemployment insurance benefits and received benefits from the week ending May 22, 2021 to the week ending August 21, 2021 for a total of \$4,994.00.

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. The administrative law judge further concludes the employer did not adequately participate at fact-finding and is subject to charge. He further concludes the claimant has been overpaid \$10,200 in Federal Pandemic Unemployment Compensation 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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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 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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further improperly reported unexcused absences could result in termination of employment and the final absence was not properly reported excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, 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) (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 section 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 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.

(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 un rebutted 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.

After her separation, the claimant received \$20,912.00 in regular unemployment insurance benefits.

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 benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits he received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ."

Iowa Code § 96.3(7)(b)(1)(a). Here, the employer is subject to charge because the administrative records show the parties were sent a notice of fact finding. Although the employer appears to have provided a number on which to be reached for the hearing, it appears to reach a third party representative who was unable to be reached on the date of the hearing.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

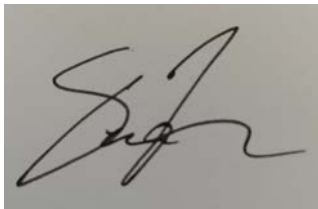
Here, the claimant is disqualified from receiving regular unemployment insurance (UI) benefits. Accordingly, this also disqualifies claimant from receiving Federal Pandemic Unemployment Compensation (FPUC). The claimant was overpaid \$10,200.00 in Federal Pandemic Unemployment Compensation (FPUC).

DECISION:

The September 1, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left her employment without good cause attributable to the employer. Benefits are withheld until such time as 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 has been overpaid unemployment insurance benefits in the amount of \$15,918.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview due to its own fault and its account (# 086656) shall be charged.

The claimant has been overpaid \$10,200.00 In Federal Pandemic Unemployment Compensation benefits. Unless the claimant obtains an FPUC waiver as described in the note below, these benefits shall be repaid.



Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

December 7, 2021
Decision Dated and Mailed

smn/scn

Note to Claimant: This decision determines you have been overpaid FPUC under the CARES Act. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Additionally, instructions for requesting a waiver of this overpayment can be found at <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment-and-recovery>. If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.