

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT J ERICKSON
Claimant

THE HON COMPANY
Employer

APPEAL 17A-UI-04166-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/12/17
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
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 6, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that the employer did not establish claimant was discharged for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was commenced on May 8, 2017, and continued to May 12, 2017, and then to May 19, 2017. The claimant, Robert J. Erickson, participated. The employer, The HON Company, participated through Mandy Mason, MCR Business Partner; and Malia Maples of Employers Edge, L.L.C., represented the employer. Exhibits A through O and Employer's Exhibits 4 through 16 were received and admitted into the record. The administrative law judge took official notice of the fact-finding documents and the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can 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, most recently as an RCI Engineer, from October 14, 2013, until November 30, 2016, when he was discharged. On November 23, 2016, a member of the employer's leadership team was looking for claimant to assist with a problem and no one was able to locate claimant. After receiving this report, the employer reviewed its badge access report and surveillance video to determine claimant's whereabouts. He initially arrived at work at 7:56 a.m. Claimant left work at 9:13 a.m. and returned at 12:56 p.m. Claimant left shortly thereafter and returned again at 2:13 p.m. and left again at 2:39 p.m.

Claimant admits that he was late to work on November 23, 2017. He testified that he suffers from depression and anxiety, both of which worsen in the winter months. Claimant knew he needed to call and let the employer know if he was going to be late, and he did not call anyone to report this information on November 23. Claimant testified that he departed at 9:13 a.m. because he was having a panic attack. Claimant notified Eric Thompson, the factory manager, that he needed to run home briefly, and then he left. Claimant recalls returning somewhere around the noon hour and then departed again due to his depression and anxiety issues. Claimant sent a text message to Ryan Pearson, the plant manager, and asked to take vacation time that afternoon. The parties agree that claimant had intermittent FMLA approved during this time period. Claimant understood that he was supposed to communicate any FMLA-covered absences to a supervisor. He believed that he was following the proper protocol when he told Thompson he was leaving on the morning of November 23. Claimant testified that while he was approved for intermittent FMLA, he had never any of this type of leave prior to November 23.

The following week, Mason and Pearson had a meeting with claimant about his absence from work on November 23. Initially, claimant reported that he had worked his standard 7:30 a.m. to 4:00 p.m. shift. Pearson then confronted claimant with the information the employer had gathered about claimant's multiple absences from work, and claimant explained that he had left several times during the day. Claimant testified that he explained to Pearson during this or another conversation that his several departures during November 23 were due to depression and anxiety.

The employer testified that it had ongoing conversations with claimant related to his attendance. On July 22, 2016, claimant received a Performance Improvement Plan regarding his attendance. (Exhibit G) This document states claimant had been at least fifteen minutes late to work three times over the prior two weeks. Claimant was notified through this document that he must arrive on time or report that he would be late prior to the beginning of his shift.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3984.00, since filing a claim with an effective date of March 12, 2017, for the eight weeks ending May 6, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview. Mason testified that her number had been submitted for the fact-finding, but she never received a call. The fact-finding documents show the fact-finder contacted a Claim Specialist with Employers Edge who provided information regarding the end of claimant's employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for excessive, unexcused absenteeism. Benefits are withheld.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the

administrative law judge finds the employer provided more credible testimony than claimant. Mason was present during the conversation following claimant's November 23 absences, and she provided credible and reasonable testimony regarding claimant's statements during that conversation. The administrative law judge does not believe that claimant reported to Pearson that his absences were due to his depression and anxiety issues.

Here, claimant's final attendance issues all occurred on November 23, 2017. Claimant reported to work approximately thirty minutes late. He did not call and let the employer know that he would be late, though he knew that was the proper procedure he should follow. He departed from work in the morning for over three hours. Even if he had notified a supervisor that he was leaving, there is no evidence that the supervisor was aware of how long claimant would actually be gone. While the administrative law judge is sympathetic to claimant's medical mental health issues, claimant was aware of the expectations for reporting absences and he did not follow the proper procedures. Claimant's final absences were not properly reported or excused. Claimant had a history of late arrivals to work. He had previously been warned about this issue, and the average employee in claimant's situation would have known his job was in jeopardy. The employer has established that claimant was discharged for excessive, unexcused absenteeism. Benefits are withheld.

The next issues are whether claimant was overpaid benefits, whether claimant must repay benefits, and whether the employer may be charged. 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 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), Iowa Admin. Code r. 871-24.10. 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 April 6, 2017 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. 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 \$3984.00 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn