

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAVID J SHUFFTY
Claimant

EXEL INC
Employer

APPEAL 17A-UI-03977-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/19/17
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
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:

Exel, Inc. (employer) filed an appeal from the April 3, 2017, reference 01, unemployment insurance decision that allowed benefits based upon the determination David J. Shuffty (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on May 5, 2017. The claimant participated. The employer participated through Human Resources Representative Jennifer Guzman. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, specifically the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits?
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: The claimant was employed full-time as a Forklift Driver beginning on April 3, 2017, and was separated from employment on March 13, 2017, when he was discharged. The employer has a practice of posting notice of mandatory overtime by the end of the Monday shifts. The employees are responsible for verifying whether they are required to work the mandatory overtime. The claimant was aware of this practice.

The employer also has an attendance policy that states after eight points, an employee will be discharged. The employer's attendance policy is no-fault and allows for four general purpose absences that do not result in points for a rolling 12-month period. The four general purpose days must be used one at a time and cannot be combined. An employee who misses a full day of work need only notify the employer before the end of the missed shift of the absence. The employee receives one attendance point for a reported absence. If an employee fails to notify

the employer of an absence, he or she receives two attendance points. An employee who arrives less than two hours late to work receives half an attendance point. Written warnings are given when an employee reaches three and a quarter and five points. A final written warning is issued on the seventh point. The claimant was aware of the point system.

The claimant took a prearranged vacation beginning June 24, 2016 for three days. His first day was a general purpose absence, but the other two resulted in points. He also took a prearranged vacation beginning September 2, 2016, again for three days. The first day of vacation was counted as a general purpose absence, but the other two days resulted in points.

On September 23, 2016, the claimant requested and was granted an absence using a general purpose day. On September 29, 2016, the claimant was a no-call/no-show for a mandatory overtime day. He did not properly check to see if he was scheduled for mandatory overtime. On September 30, 2016, the claimant received a written warning for being at five points.

The claimant was late to work by less than two hours on October 2, 2016. He was late because he overslept. On December 2, 2016, the claimant took another approved general purpose day. On January 8, 2017, the claimant was late to work by less than two hours because he overslept. The two tardy absences put him at six points.

On March 9, 2017, the claimant was again a no-call/no-show for a day of mandatory overtime. The mandatory overtime list was posted in the same place on the same color paper; however, he did not review it well enough and did not know he was scheduled. This absence put the claimant at eight points and resulted in his discharge. The claimant believed he still had a half a point left, but knew he was getting close to the maximum allowed attendance points.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,220.00, since filing a claim with an effective date of March 19, 2017, for the six weeks ending April 29, 2017. The administrative record also establishes that the employer did not answer the phone when called by the fact-finder as the witness was absent from work due to illness. The employer did submit documents that provided the date of the claimant's last absence and included its attendance policy.

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. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

“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).

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 the 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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); 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 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, supra*.

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 absences related to previously arranged vacations and general purpose days are considered excused. The claimant properly reported the absences and it is reasonable employees will request time off work for vacation. However, the claimant had two no-call/no-show absences which are unexcused because they were not properly reported. He also had two absences related to oversleeping which are unexcused because they were related to an issue of personal responsibility. The employer has established that the claimant was warned 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.

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. Participation includes documents that state at a minimum the date of the final incident and include a copy of the policy the claimant violated. 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 by providing documents with the minimum amount of information 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 3, 2017, 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 unemployment insurance benefits in the amount of \$2,220.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/rvs