

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**MELISSA A TUTTLE**  
Claimant

**VON MAUR INC**  
Employer

**APPEAL NO. 19A-UI-01140-B2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/13/19  
Claimant: Respondent (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct  
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits  
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated January 30, 2019, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on February 25, 2019. Claimant participated personally. Employer participated by Mitchell Farmer, Kayla Seitz, and Holly Sutton. Employer's Exhibits 1-7 were admitted into evidence.

**ISSUES:**

Whether claimant was discharged for misconduct?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact-finding?

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 10, 2019. Employer discharged claimant on January 10, 2019 because claimant did not get paperwork required in order to cover her many days of absences missed over and above those allowed by employer.

Claimant worked as a merchandise processor for employer. She'd worked for employer for a number of years, and had previously obtained three leaves of absence. In 2018, claimant had absences over and above those allowed by employer. From December 4, 2018 through December 7, 2018 claimant missed work. Claimant provided a doctor's note covering December 4, 2018. Claimant called in the rest of the days missed. On some of the days missed she provided specific reasons; on other days she just stated she wouldn't be in to work.

Employer requested that claimant secure a leave of absence documentation from her doctor as these absences placed claimant at a termination level after she'd received warnings following other absences. From December 7, 2018 until her date of job separation claimant missed at least a half dozen other days. Some of these were covered by call in reasons, others were not.

Claimant met with human resources on December 10, 2018, when she returned to work. They gave her documentation to be filled out by her doctor in order to get the days excused. Claimant had done this numerous times in the past. This time claimant stated that her doctor was unwilling to fill out the documents without a separate appointment, and didn't have any appointment times available. Claimant stated she missed a day and a half of work to wait in the doctor's office in hopes of meeting with the doctor, but was unsuccessful in getting to see the doctor. As a result, claimant did not forward the leave documentation to employer within the fifteen days initially requested, nor within the extended time allowing another two plus weeks to get the documents into employer. Claimant was terminated on January 10, 2019, as absent the doctor's notes, claimant had numerous days since her multiple warnings.

Claimant has received unemployment benefits in this matter.

Employer did substantially participate in fact-finding in this matter by participating in fact-finding.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence

is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant was warned concerning this policy. The last incident, which brought about the discharge, constitutes misconduct because claimant had been through the procedures to obtain a leave previously, so she cannot complain that she was confused by the time frame or the requirements. Claimant did not consistently call into work and report reasons for her absences. This causal reporting, when not supported by doctors' notes or leave notices leaves the employer without specific information to determine whether an absence should be excused. The same rationale holds for the administrative law judge who likewise has multiple days since claimant's most recent warnings where she did not have the absences properly reported or excused. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

The overpayment issue was addressed. Payments received by claimant in this matter are overpayments.

The issue of employer participation was addressed. As employer did substantially participate in fact-finding, employer's account will not be charged for overpayments.

**DECISION:**

The decision of the representative dated January 30, 2019, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

---

Blair A. Bennett  
Administrative Law Judge

---

Decision Dated and Mailed

bab/scn