

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BRYANT K EVANS

Claimant

APPEAL 17A-UI-07353-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES MOBILE WASH INC

Employer

OC: 07/02/17

Claimant: Respondent (1)

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

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

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 July 14, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 7, 2017. The claimant participated personally. The employer participated through George Romero, general manager. Shaun Reiner, president, also attended. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed part-time as a washer and was separated from employment on May 13, 2017, when he was discharged.

The claimant worked primarily Saturday and Sundays, and worked some Fridays at the beginning of his employment. He was aware he was to notify the employer if he would be absent. The claimant was tardy once during his employment when he misread the posted schedule; neither party could confirm the date. The claimant informed the employer that he had accepted other employment on May 4, 2017 but confirmed he would still work his weekend shifts. The claimant was absent on May 6, 2017 after receiving permission from Mr. Romero. Mr. Romero intended to write the claimant up for his absence on May 6, 2017 but did not

administer the warning before separation. Then on May 13, 2017, the claimant did not perform work. He had informed shop supervisor, Desi Woods, the day before that he would be absent due to his other job, and Mr. Woods stated he would inform Mr. Romero. At the beginning of his shift, the claimant learned Mr. Romero was upset with him and so he sent a text message, apologizing, stating he should have followed up with Mr. Romero directly. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$428.00, since filing a claim with an effective date of July 2, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview by way of Shaun Reiner.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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 of proof in establishing disqualifying job misconduct. *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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper, supra*.

The credible evidence presented is that the claimant was late to one shift before he was discharged. There was disputed evidence whether he had permission to be absent from his shift on May 6, 2017, and on May 13, 2017, the claimant notified the shop manager, not his

supervisor, that he would be absent due to his other job. At most, the claimant had three attendance occurrences during his employment. The administrative law judge is persuaded the claimant's absence on May 13, 2017 would be treated as unexcused for his failure to properly report the absence and because of the reason. However, the employer had not previously warned claimant about its specific expectations about reporting, frequency of absences, or arranging absences in advance. An employee might even infer employer acquiescence after multiple unreported absences without warning or counseling. Therefore, based on the evidence presented, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. The claimant is allowed benefits.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and employer relief of charges are moot.

DECISION:

The July 14, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn