

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ROGER A KRUSE
Claimant

APPEAL NO: 14A-UI-06959-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA PROTEIN SOLUTIONS LLC
Employer

OC: 06/15/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 1, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 29, 2014. The claimant participated in the hearing. Sheldon Andrews, General Manager; Alfredo Moreno, Human Resources Manager; and George Alvarez, Lead Man; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time press operator for Iowa Protein Solutions from July 25, 2012 to June 13, 2014. He was discharged from employment due to a final incident of absenteeism that occurred on June 12, 2014.

The claimant was suspended pending the outcome of a urinalysis (UA) test conducted June 3, 2014 following an accident which caused more than \$1,000.00. The claimant's test results came back as suspicious because the sample was not within the allowed temperature range. The Estherville Medical Clinic who administered the test sent it to another certified lab for further testing. The employer told the claimant it would contact him when it received the test results from the second lab. The employer received a faxed copy of the results of the second test on June 4, 2014 at 4:15 p.m. The lab felt the sample had been diluted and suggested retesting. The employer attempted to call the claimant to have him come in for a meeting. It chose not to tell him about the retest at that time. It left a voicemail on the claimant's sister's phone as that was the only number it had listed for the claimant, who lived with his sister. The claimant did not return the employer's call either June 4 or June 5, 2014. On Friday, June 6, 2014 the claimant contacted the employer around 3:30 p.m. and stated he just received its message because he

had attended a funeral June 4, 2014. The employer told him he needed to come in for a meeting Monday, June 9, 2014 after the claimant stated he could not come in June 6, 2014 because he had been out of town and it was too late in the day for him to come in. The claimant did go in around 11:00 p.m. to pick up his paycheck.

On June 9, 2014 the claimant was scheduled to meet with the employer at 8:00 a.m. but did not show up. When the employer called him he stated he overslept. He was then told to report at 8:00 a.m. June 10, 2014 for the meeting and when he arrived at 9:00 a.m., because he could not wake his girlfriend for a ride as he does not have a license, he was sent to have another UA. On June 11, 2014, at 4:01 p.m. the nurse who conducted the UA sent the employer negative test results from the claimant's UA but again stated the temperature was off, raising the question of tampering. The employer told the claimant's lead man to call him and tell him he could return to work that night. The lead man left voicemail messages for the claimant and also attempted to contact him via text message but never received a response from the claimant. On June 12, 2014 the claimant was a no-call/no-show. On June 13, 2014 the claimant contacted the employer and was told that due to the accumulation of attendance points he had received, his employment was terminated.

The employer's attendance policy states employees will be discharged upon reaching eight attendance points. They receive a verbal warning, a written warning, a final written warning, and a three-day unpaid suspension before termination of employment occurs. The claimant received written warnings or suspensions for the following absences: an absence February 19, 2014 for one point; a no-call/no-show absence March 11, 2014 for three points; one point for an absence May 14, 2014; one point for an absence June 5, 2014; one point for an absence June 9, 2014 without reporting his absence to the employer; one point for a no-call/no-show absence June 10, 2014 where the employer gave him the benefit of the doubt when he said he did not receive the message to return to work; and three points for a no-call/no-show absence June 12, 2014; for a total of 11 attendance points. The February 19 and May 14, 2014 absences were related to illness.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,541.00 since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 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 Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The claimant effectively made himself unavailable to the employer because despite the fact the employer left voice mail messages for the claimant, the claimant repeatedly denied they did so and had also run out of minutes on his prepaid cell phone. It is the claimant’s responsibility to provide the employer with a reliable, working phone number so the parties can communicate in situations like this as well as other potential circumstances where the employer may need to contact the claimant. Because the claimant failed to do that, he was absent several days in June 2014 that he actually could have worked. Since he did not contact the employer and make himself available, however, those absences resulted in attendance points until the claimant’s last no-call/no-show absence June 12, 2014 for which he received three points, which took him over the allowed eight attendance points for a total of 11 points.

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 which was a no-call/no-show absence, in combination with the claimant’s history of absenteeism, is considered excessive. Therefore, benefits must be denied.

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. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through Mr. Andrews, Mr. Moreno and Mr. Alvarez. Consequently, the claimant has received benefits in the amount of \$1,541.00 but was not eligible for those benefits. The overpayment must be recovered under Iowa Code section 96.3-7.

DECISION:

The July 1, 2014, reference 01, 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 is overpaid benefits in the amount of \$1,541.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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