

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

FRANK A RAY
Claimant

TRADESMEN INTERNATIONAL LLC
Employer

APPEAL 17R-UI-09131-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/28/17
Claimant: Respondent (1R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 July 5, 2017, (reference 01) unemployment insurance decision that allowed benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 26, 2017. Claimant participated. Employer participated through general manager Austin Hermsen. Employer's Exhibit 1 was received.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?
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: Employer is a company that contracts out its employees' services to other companies. Claimant began working for employer in September 2016.

Claimant worked on an assignment at U.S. Grain from May 1 through May 5, 2017. Throughout that week claimant complained to employer that the client was making race-based remarks that were offensive. The situation did not improve, and claimant informed employer he would not return to the assignment on Monday, May 8, 2017.

Employer gave claimant another assignment that was scheduled to begin on May 8, 2017. Before the assignment was scheduled to begin, claimant contacted sales manager Isaac Lukins and informed him he could not appear for the assignment due to illness. Lukins informed

claimant that if he did not show up for the job, he would be terminated. Claimant reiterated that he could not make it to work. Lukins sent claimant a text message the same day informing him he was terminated.

Claimant had never been previously disciplined regarding attendance.

Employer alleges it offered claimant a job assignment working for Black Hawk Roofing in June 2017, but claimant did not accept the assignment. The Benefits Bureau has not made an initial determination regarding this issue and whether it disqualifies claimant from receiving benefits.

REASONING AND CONCLUSIONS OF LAW:

The parties in this case gave two completely different versions of how the employment ended. Employer's witness, Austin Hermsen, had almost no firsthand knowledge regarding the details of claimant's separation from employment. The firsthand knowledge Hermsen did have regarding the end of claimant's employment and claim for unemployment insurance benefits was unreliable. Employer presented only one exhibit, which had little to do with the issues in this case. Employer's witness with firsthand knowledge, Isaac Lukins, was not present for the hearing. Therefore, I find claimant's version of the facts more credible than employer's and find claimant was terminated after his absence from work on May 8, 2017.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because his last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Because claimant is qualified to receive benefits, the issues regarding overpayment of benefits are moot and will not be discussed further in this decision.

Employer alleges it offered claimant a job assignment working for Black Hawk Roofing in June 2017, but claimant did not accept the assignment. The Benefits Bureau has not made an initial determination regarding this issue and whether it disqualifies claimant from receiving benefits. Therefore, that issue must be remanded to the Benefits Bureau for an initial investigation and determination.

DECISION:

The July 5, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

REMAND:

This issue of whether claimant refused to accept a suitable offer of work in June 2017, as delineated in the findings of fact above, is remanded to the Benefits Bureau for an initial investigation and determination.

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Decision Dated and Mailed
cal/scn