

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL J BRAFFORD
Claimant

DES MOINES JIM HAWK TRUCK TRAILER
Employer

APPEAL 19A-UI-09534-AW-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/03/19
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:

Employer filed an appeal from the November 26, 2019 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 18, 2019, at 9:00 a.m. Claimant did not participate. Employer participated through Barbara Mullenix, Office Manager, and Kelly Iversen, General Manager. Employer's Exhibit 1 was admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time mechanic from October 24, 2019 until his employment with Jim Hawk Truck Trailers, Inc. ended on October 31, 2019.

Employer has an attendance policy that prohibits excessive absenteeism and tardiness. (Exhibit 1) The policy states that excessive tardiness is punishable by progressive discipline up to and including termination of employment. (Exhibit 1) Claimant received a copy of the attendance policy. (Exhibit 1) When claimant interviewed for the position, he informed employer that his prior employment was terminated due to excessive tardiness. Employer told claimant that tardiness would not be tolerated.

On October 28, 2019, claimant called employer five minutes prior to the beginning of his shift to notify employer that he would be late to work. Claimant did not provide a reason for his tardiness. Claimant did not attend work at all that day and did not notify employer that his tardiness would, in fact, be an absence. On October 29, 2019, claimant was 17 minutes late for

work, did not notify employer prior to the beginning of his shift, and did not provide a reason for his tardiness. On October 29, 2019, employer warned claimant that being on time for work was essential and that continued absenteeism and tardiness would result in termination of his employment. On October 30, 2019, claimant called employer five minutes prior to the beginning of his shift to notify employer that he would be late to work. Claimant said that he was running late and was on his way. It should take claimant 30 minutes to get to work. Claimant arrived at work over four hours late. On October 31, 2019, claimant called employer two and a half hours after the start of his shift to notify employer that he was running late to work. On October 31, 2019, employer discharged claimant for excessive tardiness and absenteeism.

The administrative record reflects that claimant has received no unemployment insurance benefits since his original claim was filed effective November 3, 2019.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

Iowa Code section 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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Excessive absences are not considered misconduct unless unexcused. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence, the absence is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Employer clearly stated its expectation to claimant that tardiness would not be tolerated. Claimant's absences on October 28, 2019, October 29, 2019, October 30, 2019 and October 31, 2019 are unexcused because none were for reasonable grounds and two were also not properly reported. Four unexcused absences during one week of employment are excessive. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

Because claimant has received no unemployment insurance benefits since filing his original claim effective November 3, 2019, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The November 26, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

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Decision Dated and Mailed

acw/scn