IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ERIC J KRIEGLER Claimant	**APPEAL 20A-UI-01080-JC**
	ADMINISTRATIVE LAW JUDGE DECISION
PIZZA KING INC Employer	
	OC: 01/05/20 **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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/appellant, Pizza King Inc., filed an appeal from the January 30, 2020 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. An in-person hearing was held at the Council Bluffs IWD office on March 6, 2020 with administrative law judge, Jennifer L. Beckman. The claimant participated personally. The employer, Pizza King Inc., participated through Chris Poulos, manager. Pete Poulos and George Poulos also testified. The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-and Claimant Exhibits A-C were admitted. 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:

Did the claimant voluntarily quit the employment with good cause attributable to the employer or 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 full-time as a line cook and was separated from employment on January 2, 2020, when he separated from employment. The evidence is disputed as to whether he quit or was discharged. Continuing work was not available after January 2, 2020.

The employer does not have a written policy related to attendance or progressive discipline, but stated it verbally communicates to employees that they are expected to call the restaurant one to two hours prior to a shift and speak to a manager if unable to work. The employer states an

employee is deemed to have separated by job abandonment if he is a no-call/no-show for three consecutive days. This policy is also not in writing.

The claimant was absent on June 27, 2019 when his young daughter was injured. He was a no-call/no-show on August 15, 2019 for unknown reasons. He text messaged George Poulos on September 6, 2019 to report an absence due to his mother being sick (Employer Exhibit 2A). He was a no-call/no-show on October 19, 2020. On October 23, 2019, he text messaged George Poulos to report a tardy (Employer Exhibit 2) and was directed to contact the store and not text him anymore. On December 14, 2019, he was late to work due to transportation (Employer Exhibit 2B) and still being intoxicated from his birthday (Claimant testimony). He was absent December 18, 2019 for illness and text messaged to report his absence (Employer Exhibit 2B). The claimant had no written warnings but was verbally warned by the employer (Chris Poulos testimony) and acknowledged in part via text message he knew he could not be late again (Employer Exhibit 2C) at some point during employment.

The employer opined that the claimant voluntarily quit because he was absent without proper notification on December 30, 2019, was a no-call/no-show on December 31 and did not call the employer on January 1, 2020 (even though the employer was closed). The employer considered December 30, 31 and January 1, 2020 to be three days of no-call/no-show.

He last worked on December 29, 2019. The claimant had been sick and he believed it was visible to his coworkers, but he did not go to a doctor until January 2, 2020 after separation occurred (Claimant Exhibit C). On December 30, 2019, the claimant text messaged Chris Poulos to report he was sick (Claimant Exhibit B/Employer Exhibit 2D). Mr. Poulos directed the claimant to call Pete Poulos at the store as he was not there (Claimant Exhibit B/Employer Exhibit 2D). The undisputed evidence is the claimant did not call the store. When questioned why, he stated, he just didn't. He also stated that he had texted to alert the employer and they knew he had been sick.

On December 31, 2019, the claimant did not call the employer, text the employer or make any effort to notify the employer he would be absent due to illness. The claimant's phone was shut off by the phone company for failure to pay the bill, and that he is why he did not call or respond to the employer's attempt to reach him. The employer reported that New Year's Eve is very busy for the employer and the claimant's absence was detrimental to the business and customer experience that evening.

The restaurant was closed on January 1, 2020. The claimant's father paid his phone bill and phone service was restored. He did not attempt to contact the employer via text or phone or acknowledge missing his shift the day before. On January 2, 2020, the claimant attempted to return to work but was told by Pete Poulos that employment had ended.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,379.00, since filing a claim with an effective date of January 5, 2020. The administrative record also establishes that the employer did participate in the January 28, 2020 fact-finding interview or make a witness with direct knowledge available for rebuttal. Pete Poulos participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged from the employer. The administrative law judge further concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected

misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Here, the employer stated the claimant quit the employment due three days of no-call/no-show on December 30, 31 and January 1, 2020. The employer does not have a policy putting employees on notice that three consecutive days of no contact, regardless of whether scheduled or the restaurant is open, would constitute job abandonment. Further, the administrative law judge does not view it logical or reasonable to have expected the claimant's lack of notification on January 1, 2020 to have been evidence or intent of quitting, given that he wasn't scheduled and the restaurant was closed. Rather, the claimant failed to properly report his absence on December 30, 2019, was a no-call/no-show on December 31, 2019 and when he attempted to return on January 2, 2020, he was told he no longer was employed. By the fact the claimant tried to return after missing two consecutive shifts, the claimant showed an intent to remain employed and that the employer initiated separation by telling him he no longer was employed.

In this case, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). Therefore, the issue at hand is whether the claimant was discharged for disqualifying job related misconduct.

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

In the specific context of absenteeism, the administrative code provides:

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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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.

Cognizant that the employer's lack of written policy or written invites miscommunication or misunderstanding, the administrative law judge is persuaded the claimant knew he should have contacted the store to report his absence on December 30, 2019, when his manager directed him specifically to do so. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The claimant offered no persuasive evidence as to why he refused to call the store, and so even though he may have been sick, the administrative law judge is not persuaded his absence would be considered excused for purposes of determining unemployment insurance eligibility.

Then the claimant was a no-call/no-show on December 31, 2019. The reason the claimant did not work was due to illness. The reason the claimant did not report the absence was due to his cell phone being shut off after non-payment. This is a personal reason and does not excuse the claimant's lack of notification to the employer. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The claimant's assertion that the employer knew he was sick was not persuasive. The administrative law judge concludes the claimant's final absence was not properly notified (even though due to illness) and therefore not excused.

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 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).

Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. At a minimum, the claimant had two unexcused absences on December 30 and 31, 2019 as well as tardies on October 23 and December 14 for transportation, and a no-call/no-show on August 15, 2019 for unknown reasons. Without considering any other absences, the claimant had at least five unexcused absences in six months of employment.

While the claimant may not have received written warnings, the administrative law judge is persuaded the claimant knew or should have known his attendance was placing his job in jeopardy, based upon conversations with the employer and acknowledging via text message that he knew he had already been in trouble due to tardies. The final two absences included the claimant not calling the store to report his absence, when directed by management, and a no-call/no-show for his following shift. Based on the evidence presented, the administrative law

judge is persuaded that these actions coupled together, when considered with his attendance history support a finding of excessive absenteeism after verbal warnings. The administrative law judge is persuaded the claimant knew or should have known his conduct on December 30 and 31, 2019 was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct. Benefits are denied.

The next issues to address are whether the claimant must repay the benefits he received, and whether the employer's account may be relieved of charges.

Iowa Code § 96.3(7)a-b provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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 § 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.
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> (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 § 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.
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>> (1) 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 states pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (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 unrebutted 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of $1379.00. 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. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the scheduled

fact-finding interview by way of Pete Poulos. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The unemployment insurance decision dated January 30, 2020, (reference 01) is reversed. The claimant did not quit the employment but was discharged. The claimant was discharged from employment due to job-related misconduct. 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 was overpaid $1,379.00 in benefits and must repay the benefits because the employer participated in the fact-finding interview. The employer's account is relieved of charges.

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Decision Dated and Mailed

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