

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILISHA A BAGLEY
Claimant

APPEAL NO. 11A-UI-15062-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANPOWER INC OF D M
Employer

**OC: 10/16/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated November 18, 2011, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 9, 2012. The employer participated by Tammy Willets, on site staffing specialist. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Tammy Willets and Employer's Exhibit 1.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a temp-to-hire business. The claimant was hired on March 8, 2011, and was assigned to the Bunn-o-matic manufacturing plant located in Creston, Iowa. The claimant was a full-time production worker. Her last day of work was October 19, 2011. She was terminated on October 20, 2011.

The incident that led to the claimant's termination occurred on October 20, 2011. The claimant left work early for reasons that she would not specify for the employer. When the claimant left early, she was on a final warning for excessive absenteeism and she knew her job was in jeopardy. On October 20, 2011, the claimant called the employer and said that she would not be in to work. She said that she had an interview and would not provide the employer with any more information. She terminated due to excessive absenteeism.

The employer's attendance policy states that if an individual has more than three "hits" in 90 days, the warning process begins. The claimant had 14 absences beginning with March 24, 2011, through October 5, 2011. Since most of the claimant's absences were due to illness, the employer endeavored to work with the claimant. The claimant's final two absences were not due to illness.

REASONING AND CONCLUSIONS OF LAW:

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 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.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

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.

871 IAC 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350

N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to establish misconduct.

The evidence in this case established that the claimant was terminated due to excessive unexcused absenteeism. The claimant was initially hired on March 8, 2011, and then had 14 absences between March 24, 2011, and October 5, 2011. Since most of these absences were due to personal illness, the employer tried to work with the claimant. She was on a final warning as of August 15, 2011, and knew her job was in jeopardy. The claimant then had two unexcused absences on October 19, 2011, and October 20, 2011. She would not tell the employer why she was going to be gone. She had had a prior unexcused absence on August 23, 2011.

Although most of the claimant's absences were due to personal illness, she was not terminated until she had unexcused absences on October 19, 2011, and October 20, 2011. The final two absences were unexcused. There was a prior unexcused absence on August 23, 2011. This is considered excessive, given the date of hire on March 8, 2011. The claimant knew she was in jeopardy of losing her job. The claimant did not participate in the hearing and the exact reason for her absenteeism for these final two days is not known. Under these circumstances, the administrative law judge concludes that the claimant was terminated for excessive unexcused absenteeism. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

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.

b. (1) 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 section 96.8, subsection 5. 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 section 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. The employer shall not be charged with the benefits.

(2) 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 state pursuant to section 602.10101.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The representative's decision dated November 18, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw