

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PATRICK A TUSSING**

Claimant

**APPEAL NO. 11A-UI-11168 -VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEBSTER CITY CUSTOM MEATS INC**

Employer

**OC:07/17/11**

**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 August 17, 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 September 15, 2011. The hearing could not be completed at this time and the case was rescheduled for September 30, 2011. Claimant participated. Employer participated by Constance Ingraham, vice president administration/finance; Dale Gonnerman, pack off supervisor; and Misty Kepler, human resources. The record consists of the testimony of Constance Ingraham; the testimony of Dale Gonnerman; the testimony of Misty Kepler; the testimony of Patrick Tussing; Claimant's Exhibits A through D; and Employer's Exhibits 1 through 14.

**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 witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a meat processing facility located in Webster City, Iowa. The claimant was hired on October 18, 2010, as a pack off laborer. He was a full-time employee. The claimant's last day of work was July 21, 2011. He was terminated on July 21, 2011.

The incident that led to the claimant's termination occurred on July 20, 2011. The employer has a written rule, of which the claimant was aware, that any absence for a shift must be reported prior to the start of the shift. The claimant's shift began at 6:30 a.m. The claimant did not report his absence until 10:39 a.m. He called Misty Kepler and told her that he would not be at work that day because he was going to the chiropractor.

The claimant did not report his absence as required by the employer's policy on the following day: June 21, 2011; June 13, 2011; June 8, 2011; June 7, 2011; June 6, 2011; May 16, 2011; and March 28, 2011. The claimant was a no-call, no-show on December 28, 2010. On April 4, 2011, the claimant was given a written warning. A second warning on June 13, 2011, was given for unexcused absences and sick days due to the failure to call in on time. He was informed his job was in jeopardy. The claimant was counseled about his attendance on June 21, 2011.

### **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). Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The evidence in this case established that that the claimant persistently and deliberately violated the employer's attendance policy on reporting absences. The employer's written policy states that any absence must be reported prior to the start of the shift. The claimant did not follow this policy despite two written warnings and verbal counseling. On June 13, 2011, the claimant was told that his job was in jeopardy due to his failure to call in properly. The claimant had another late call in on July 21, 2011. When asked why he would call in late, the claimant said it was due to oversleeping.

Although the claimant's absences were due to personal illness, he did not properly report his absence and therefore the absence is considered unexcused. In addition, the claimant did not follow his employer's reasonable requirement that any absence be reported prior to the start of the shift. This is insubordination. Whether the case is viewed as one of excessive unexcused absenteeism or insubordination, the employer has shown misconduct. 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 August 17, 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 his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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