

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TROY A PETERSON**  
Claimant

**AADG INC  
CURRIES-GRAHAM**  
Employer

**APPEAL NO: 14A-UI-01247-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/29/13  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(7) – Definition of Misconduct  
Section 96.4-3 – Able and Available  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated January 27, 2014, reference 01, that held the claimant was not discharged for misconduct on August 20, 2013, and benefits are allowed. A telephone hearing was held on February 25, 2014. The claimant participated. Mark Evers, HR Director, participated for the employer.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is able and available for work.

**FINDINGS OF FACT:**

The administrative law judge having heard the witness testimony and having considered the evidence in the record, finds: The claimant was hired on November 21, 1994, and last worked for the employer as a full-time production worker in August 2013. He received the employer attendance policy in an employee handbook when hired and an updated one about ten years later. The employer also makes the policy available on-line. The policy is two days no-call no-show is grounds for termination.

Claimant saw a doctor for stress due to a divorce and personal issues in August. He was prescribed medication. He made an application to be off work for two weeks that allowed him to be paid for one week of vacation. The employer expected him to return to work on Monday August 19 at 7:00 a.m. Claimant had exhausted FMLA in May 2013.

Claimant left a recorded message for a supervisor on August 19 about 10:00 a.m. reporting an absence from work. Claimant failed to report for work at 7:00 a.m. on August 20. The employer called claimant about 10:00 a.m. and later spoke with him. The employer had issued claimant a corrective action for a no-call no-show on May 18, 2013. Claimant signed for it. The employer

discharged claimant on August 20 for two no-call no-shows to work. He states he saw his doctor later that day who released him to return to work. Claimant has been unemployed since his employment separation until he moved to Arkansas about December 15.

Claimant has received unemployment benefits totaling \$1,632 for a four-week period ending February 15, 2014. The overpayment issue was not included on the hearing notice nor was the issue whether claimant should repay it and the employer's account charged for benefits.

## **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(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 administrative law judge concludes employer has established claimant was discharged for misconduct in connection with employment on August 20, 2013.

The employer issued claimant a written warning on May 18, 2013 for a no-call no-show to work. Claimant made a late call (three hours) to report an absence on August 19 that is considered a no-call no-show. He was a no-call no-show to work for August 20 and there was no communication until the employer initiated a call to claimant late in the morning.

While claimant contends he was under doctor care for stress, he knew he had run out of FMLA and used vacation to get paid for the leave period up to his scheduled return for August 19. He offered no doctor statement to the employer excusing him for reporting to work on August 19/20. Claimant's absenteeism is excessive and not for excusable medical reasons. Job disqualifying misconduct is established.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements

of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge further concludes claimant has not provided medical evidence to the department he is able and available for work. He has been unemployed from August 20, 2013 until he moved to Arkansas about December 15.

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 administrative law judge further concludes claimant is overpaid benefits \$1,632 for the four weeks ending February 25, 2014 due to the disqualification imposed in this matter. The issue whether claimant is required to pay it and/or the employer account is charge is remanded to claims.

**DECISION:**

The department decision dated January 27, 2014, reference 01, is reversed. The claimant was discharged for misconduct on August 20, 2013. The claimant does not meet the availability requirements of the law. Claimant is overpaid benefits \$1,632 but the issue as to repayment and employer charging is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs