

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EUGENE H WHISENAND
Claimant

APPEAL NO. 09A-UI-19642-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIRECTV INC
Employer

OC: 11/08/09
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

DirecTV filed an appeal from a representative's decision dated December 22, 2009, reference 01, which held that no disqualification would be imposed regarding Eugene Whisenand's separation from employment. After due notice was issued, a hearing was held by telephone on April 15, 2010. The employer participated by Ed Seufferer, Site Manager, and was represented by Steve Zaks of Barnett Associates. Mr. Whisenand did not respond to the notice of hearing.

ISSUE:

At issue in this matter is whether Mr. Whisenand was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Whisenand was employed by DirecTV from March 9 until November 9, 2009 as a full-time installer. He was discharged because of his attendance. Mr. Whisenand was absent without calling in on October 20. When he returned to work on October 21, he indicated he had been absent the prior day because of personal business. He was again absent without notice on October 23. He later told the employer the absence was due to a court date and that he was too stressed to call to report the absence.

During the week of October 26, the employer met with Mr. Whisenand and gave him a verbal warning regarding his attendance. At that time, he indicated he needed to be in court on November 5, 6, and 9. He was told to contact human resources to see if the time off would be approved and it was not. He was not a subpoenaed witness on any of the November dates. Although the time off was not approved, Mr. Whisenand was absent on all three dates. As a result, he was discharged from the employment. Attendance was the sole reason for the separation.

Mr. Whisenand filed a claim for job insurance benefits effective November 8, 2009. He has received a total of \$4,380.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Mr. Whisenand had unexcused absences on October 20 and 23. The absences are unexcused because they were due to matters of purely personal responsibility. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). In spite of receiving a verbal warning regarding his two prior unexcused absences and in spite of knowing that his request for time off in November was not approved, Mr. Whisenand accumulated three additional unexcused absences on November 5, 6, and 9. He had a total of five unexcused absences in three weeks. The administrative law judge considers this excessive. Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect and is, therefore, misconduct within the meaning of the law. Accordingly, benefits are denied.

Mr. Whisenand has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated December 22, 2009, reference 01, is hereby reversed. Mr. Whisenand was discharged for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Whisenand will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css