

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN L NUNNALLY
Claimant

APPEAL NO. 08A-UI-03159-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA
Employer

OC: 02/24/08 R: 03
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The University of Iowa filed an appeal from a representative's decision dated March 27, 2008, reference 01, which held that no disqualification would be imposed regarding Steven Nunnally's separation from employment. After due notice was issued, a hearing was held by telephone on April 15, 2008. The employer participated by Dave Bergeon, Human Resources Specialist; Ellen Hergert, Assistant Director of Human Resources/Food and Nutrition; and George Boateng, Food Production Supervisor.

Mr. Nunnally participated personally but became disconnected near the end of the hearing. Three attempts were made to reconnect him prior to the hearing record being closed at 9:38 a.m. All three calls were answered by a voice recording. Mr. Nunnally called at 9:52 a.m. to advise that his telephone card ran out of time. Because it was his responsibility to make sure he had adequate telephone service to participate in the hearing, the administrative law judge declined to reopen the hearing record.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Nunnally was employed by The University of Iowa from September 1, 2004 until February 28, 2008. He was employed full time as a kitchen helper. He was discharged for repeatedly violating the employer's standards.

Mr. Nunnally was verbally warned several times prior to January 28, 2008 that he was not to use chewing tobacco in the work area. He was given a written warning and five-day suspension on January 28, 2008 after he was observed using chewing tobacco in the work area. The decision to discharge Mr. Nunnally was prompted by the fact that he was again observed using

chewing tobacco in the work area on February 26, 2008. He was notified of his discharge on February 28, 2008.

In making the decision to discharge, the employer also considered the fact that Mr. Nunnally had been disciplined regarding his attendance. He had received a verbal warning, a written warning, a one-day suspension, and a three-day suspension as a result of his attendance. The last disciplinary action regarding attendance was on December 14, 2007. Mr. Nunnally's attendance record was not available during the hearing.

Mr. Nunnally filed a claim for job insurance benefits effective February 24, 2008. He has received a total of \$1,160.00 in benefits since filing his 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). Mr. Nunnally was discharged because of his attendance and because he continued to use chewing tobacco in work areas after being warned.

The employer did not present evidence of Mr. Nunnally's absences. An individual who was discharged because of attendance is disqualified from receiving benefits if he was excessively absent on an unexcused basis. Properly reported absences that are for reasonable cause are considered excused absences. Without specific information concerning the dates of absences and the reasons given for being absent, the administrative law judge cannot determine if Mr. Nunnally's absences were excused or unexcused. The fact that he was warned about his attendance does not establish that the absences were unexcused. The administrative law judge is not bound by an employer's designation of an absence as unexcused. For the above reasons, it is concluded that the employer failed to establish that Mr. Nunnally's attendance constituted misconduct.

The other reason for Mr. Nunnally's discharge was his repeated use of chewing tobacco in work areas after being warned. He received a written warning about the conduct on January 28, 2008 after repeated verbal warnings failed to correct his behavior. He was clearly on notice as of January 28 that continuing to use chewing tobacco in work areas could result in his discharge. In spite of the warning, he again used chewing tobacco in a work area on February 26. Mr. Nunnally may well have been on break when observed with tobacco on February 26. However, the fact remains that he was in a work area at the time.

Mr. Nunnally's use of chewing tobacco in a food service facility had the potential of adversely impacting sanitation standards. He knew the employer's standards and that his conduct was in violation of those standards. His failure to conform his behavior to the employer's standards after warnings constituted a substantial disregard of the employer's standards. For the reasons cited herein, benefits are denied.

Mr. Nunnally has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated March 27, 2008, reference 01, is hereby reversed. Mr. Nunnally was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Nunnally has been overpaid \$1,160.00 in job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw