

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AIR PAENGVAEN
Claimant

APPEAL NO. 10A-UI-08114-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SARA LEE CORP
Employer

OC: 05/02/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Sara Lee, filed an appeal from a decision dated May 25, 2010, reference 01. The decision allowed benefits to the claimant, Air Paengvaen. After due notice was issued a hearing was held by telephone conference call on July 22, 2010. The claimant participated on his own behalf. The employer participated by Human Resources Generalist Terry Vrieze.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Air Paengvaen was employed by Sara Lee from September 23, 2008 until May 4, 2010 as a full-time production worker on the 10:15 p.m. until 6:45 a.m. shift. The employer gives ten attendance points to each new employee and, with each week of perfect attendance, the employee may accumulate up to 96 points. Points are deducted for unexcused absences and when an employee reaches 17 points, a “level three” warning is issued. Mr. Paengvaen received seven “level three” warnings, mostly for leaving work early without permission.

On the evening of May 3, 2010, the claimant came to work at 10:00 p.m. and asked his supervisor if he could have the night off because his child had a fever. The supervisor said he was needed and could not go home but she would reassess the production needs in a few hours.

Around 2:00 a.m. Mr. Paengvaen again asked the supervisor if he could go home and she said no, because he was still needed. He said he was going home anyway and went to speak with Human Resources Generalist Terry Vrieze. At first he tried to tell Mr. Vrieze the supervisor was sending him home because work was done, but the supervisor had already contacted human resources about the situation. Mr. Vrieze told the claimant he had only three points left in his account and leaving early would cost him four points, which would result in discharge.

Mr. Paengvaen said his child was sick and might have to go to the emergency room. The employer asked if there was another adult caring for the child and the claimant said the mother was there but she did not speak English. The child had a small fever before the claimant left for work that night and no one had notified him after he was at work that anything had changed. The child's mother had not called and requested him to come home and take the child to the hospital. In fact, when Mr. Paengvaen got home the child was better and never did require medical attention. He elected to go home early without permission and was discharged by Mr. Vrieze before he left.

Air Paengvaen has received unemployment benefits since filing a claim with an effective date of May 2, 2010.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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(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 claimant had been advised his job was in jeopardy as a result of his absenteeism. He was advised of this in the early hours of May 4, 2010, when he requested to go home but elected to take the extra points and be discharged. The record establishes there was no critical need for the claimant to leave work early that night. Although his child had had a slight fever early in the evening there was no reason for Mr. Paengvaen to believe anything had changed or that the child needed to go for medical treatment. He simply left early without good cause and without permission from the employer. He elected to do this even though he had been told it would cost him his job. This was a final unexcused absence. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

Iowa Code § 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 claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of May 25, 2010, reference 01, is reversed. Air Paengvaen is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs