

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SAMUEL L BOOKER
Claimant

APPEAL NO: 06A-UI-08356-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BEEF PRODUCTS INC
Employer

OC: 06/04/06 R: 03
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Beef Products, Inc. (employer) appealed a representative's August 17, 2006 decision (reference 02) that concluded Samuel L. Booker (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the employer had not filed a timely protest. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 6, 2006. The claimant participated in the hearing. Rick Wood, Jennifer Stubs and Charlene Schuman appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the employer file a timely protest?

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on November 24, 1998. The claimant worked as a full-time laborer on the night shift. The claimant understood the employer's written attendance policy. The policy informed employees they could be discharged for excessive absenteeism if they accumulated 14 attendance points.

During the claimant's employment, he was late for work seven times between June 13, 2005 and June 2, 2005. The claimant was anywhere from 15 minutes to over an hour late for work. The claimant received a point each time he was late for work. On September 26, the claimant received three points because he called in after his shift started to report he would be late for

work. The claimant did not report to work at all that day and did not contact the employer again. On April 5, 2006, the claimant did not report to work, because he had transportation problems. The claimant received three points on April 5, 2006. On June 2, when the claimant was an hour and 22 minutes late for work because he overslept, the claimant realized he had accumulated 13 attendance points. The claimant understood his job was in jeopardy.

The claimant's wife had been ill and he took on extra household responsibilities. The claimant usually went to sleep at 7:00 or 8:00 p.m. so he could get up and report to work at 11:30 p.m. or midnight. After the claimant overslept on June 2, he did nothing more to get to work on time. On June 6, the claimant again forgot to get up when his alarm went off. The claimant overslept again. The claimant was an hour and six minutes late for work on June 6. As a result of being late, the claimant received his 14th attendance point. On June 6, the employer discharged the claimant for violating the employer's attendance policy by accumulating 14 attendance points.

The claimant established a claim for unemployment insurance benefits during the week of June 4, 2006. The claimant filed claims for the weeks ending June 10 through September 9, 2006. The claimant received a total of \$4,752.00 in benefit for these weeks.

When an employee's employment ends, the employer sends a Separation Notice, Form 60-0154, to the Department. The form lets the Department know about an employment separation. By sending in this form, the employer guarantees a fact-finding will be held even if the employer does not respond to a Notice of Claims. Schuman sent the Notice of Separation form to the Department on June 6 or 7, 2006.

On June 9, the Department mailed a Notice of Claim to the employer's corporate office. The employer's corporate human resource manager, Theresa Pederson, completed the form on June 18, 2006. She then forwarded the completed notice of claim protest to Schuman at the Waterloo facility. Normally, Schuman verifies the accuracy of the information, makes any necessary changes, and then sends the completed protest form to the Department. Schuman did not receive the form Pederson completed on June 18, 2006. As a result, Schuman did not fax or send the completed notice of claim form to the Department.

In August 2006, the employer noticed on its quarterly statement of charges that the claimant had received benefits which were charged to the employer's account. Since the employer had completed the Employment Separation Form and no fact finding hearing had been completed, the employer contacted the Department and faxed a copy of the February 18 completed notice of claim form. Department considered the employer's August 17, 2006 fax as the employer's protest.

REASONING AND CONCLUSIONS OF LAW:

The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. Another portion of Iowa Code § 96.6-2 dealing with timeliness of an appeal from a representative's decision states an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa Supreme Court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979).

The reasoning and holding of the Beardslee court is considered controlling on the portion of Iowa Code § 96.6-2 which deals with the time limit to file a protest after the notice of claim has

been mailed to the employer. When an employer files a Notice of Separation, Form 60-0154, the form must be postmarked or received before or within ten days of the date the Notice of Claim was mailed to the employer. 871 IAC 24.8(2). When an employer files a timely Notice of Separation, the Department schedules a fact-finding interview even if the employer has not filed a timely protest.

The facts indicate the employer filed a timely Notice of Separation. The employer's corporate office received the June 9 Notice of Claim form and faxed it to the employer's Waterloo office on June 18, 2006. For some reason, the Waterloo office or Schuman did not receive the corporate office's June 18 fax. Since the employer effectively protested any charges against its account by sending the Notice of Separation form on June 6 or 7, the employer had no reason to believe its account would be charged based on any benefits the claimant received. When the employer received information that its account had been charged, the employer immediately protested the claimant's receipt of any benefits and any charges against the employer's account.

When an employer files a timely Notice of Separation, the Department must investigate the reasons for the claimant's unemployment even when the employer does not timely respond to a Notice of Claim. The Department made a mistake when no fact finding was held. In this case, the Appeals Section has legal jurisdiction to address the merits of the employer's appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The claimant knew and understood, as of June 2, his job was in jeopardy if he was late for work one more time. Four days later, the claimant was again more than an hour late for work. The claimant overslept for the second time in four days. The claimant acknowledged he took no precautionary steps or did anything differently so he would not again oversleep. Since the majority of the claimant's attendance points occurred as a result of the claimant reporting to work late, he knew his job was in jeopardy and he did nothing to correct this problem. The claimant's repeated failure to report to work on time constitutes work-connected misconduct. As of June 4, 2006, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending June 10 through September 9, 2006. The claimant has been overpaid \$4,752.00 in benefits for these weeks.

DECISION:

The representative's August 17, 2006 decision (reference 02) is reversed. The employer filed a timely protest by filing a Notice of Separation Form on June 6 or 7, 2006. The employer discharged the claimant for disqualifying reasons as of June 6, 2006. The claimant is disqualified from receiving unemployment insurance benefits as of June 4, 2006. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits for the weeks ending June 10 through September 9, 2006. The claimant has been overpaid and must repay a total of \$4,752.00 in benefits he received for these weeks.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw