

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**BRYAN TATE**  
Claimant

**APPEAL NO. 14A-UI-04185-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MIDWEST PROFESSIONAL STAFFING LLC**  
Employer

**OC: 04/28/13**  
**Claimant: Respondent (2/R)**

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Iowa Code § 96.5(2)(a) - Discharge for Misconduct  
Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Midwest Professional Staffing, LLC (employer) appealed an unemployment insurance decision dated April 14, 2014, (reference 03), which held that Bryan Tate (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 9, 2014. The claimant participated in the hearing. The employer participated through Kelli Palazzo, Staffing Manager; Angela Essink, Recruiting Supervisor; and Cyndi Mahlstadt, Administrative Manager. Employer's Exhibit One was admitted into evidence. The separation issues were inadvertently left off the hearing notice. Both parties waived their right to a formal notice of the separation issues so they could be addressed in the hearing today.

**ISSUE:**

The issue is whether the claimant was discharged for work-related misconduct and whether he was overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a full service staffing agency. The claimant was initially hired on May 1, 2012, and assigned to work at Equifax. He was hired as a permanent employee by Equifax on September 29, 2012. The claimant was subsequently discharged from Equifax and sought additional employment with the employer.

On September 6, 2013, the claimant was hired for data entry/computer work at DCI, Inc. He was required to work eight hours per day, five days a week for a total of 40 hours. The claimant failed to meet this requirement even after he was counseled regarding his poor attendance. His weekly hours are documented as follows and reflect the prior week's hours:

<u>Week ending</u>	<u>Hours</u>
09/12/13	08.00
09/19/13	39.75

09/26/13	40.00
10/03/13	40.00
10/10/13	40.00
10/17/13	34.00
10/24/13	38.75
10/31/13	40.00
11/07/13	40.00
11/14/13	40.00
11/21/13	28.50
11/28/13	40.00
12/05/13	32.00
12/12/13	28.50
12/19/13	40.00
12/26/13	31.75
12/31/13	28.00
01/10/14	32.00
01/17/14	32.00
01/24/14	36.50
01/31/14	33.25
02/07/14	39.50
02/14/14	34.75
02/21/14	31.00
02/28/14	30.50
03/07/14	37.50
03/14/14	40.00
03/21/14	32.00
03/28/14	37.25
04/04/14	22.00

With the exception of the first and the last weeks of his employment, the claimant only worked the required full time hours 9 out of 28 weeks. The claimant admitted that he could not work 40 hours each week and attributed it to having young children. The employer's policy requires the employees to contact both the client and the employer when they are going to be absent. The claimant never notified the employer of any of his absences. The client was also upset with the claimant regarding excessive use of his personal cell phone but he does not think this was an issue. The claimant was discharged on March 26, 2014.

The claimant filed a claim for unemployment insurance benefits effective April 28, 2013, and has received benefits after the separation from employment in the amount of \$1,097.00. Kelli Palazzo participated in the fact-finding interview on behalf of the employer.

**REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant

was discharged on March 26, 2014, due to 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. 871 IAC 24.32(7).

The Iowa Supreme Court in the case of *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct and includes tardiness, leaving early, etc. The Court in the case of *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of “personal responsibility such as transportation problems and oversleeping are considered to be unexcused.”

The employer has established that the claimant was warned about his attendance. His consistent failure to work full-time hours and to properly report his absences constitutes excessive unexcused absenteeism. Benefits are denied.

Iowa Code § 96.3(7) provides that benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer’s failure to participate, that employer’s account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7 and 871 IAC 24(10).

In the case herein, the claimant received benefits in the amount of \$1,097.00 and Kelli Palazzo participated in the fact-finding interview on behalf of the employer. However, since the parties did not get proper notice of the potential waiver provision and/or continued charges to the employer’s account, the case is remanded for a final determination on that matter.

**DECISION:**

The unemployment insurance decision dated April 14, 2014, (reference 03), is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded for a further determination on the overpayment.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

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