

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN D STALDER
Claimant

APPEAL NO. 09A-UI-08997-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN GAMES INC
Employer

OC: 05/17/09
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, American Games, filed an appeal from a decision dated June 15, 2009, reference 01. The decision allowed benefits to the claimant, Justin Stalder. After due notice was issued a hearing was held by telephone conference call on July 9, 2009. The claimant participated on his own behalf. The employer participated by Supervisor Ed Childers, Production Manager Tom Adams and was represented by TALX in the person of Josh Burrows.

ISSUE:

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

FINDINGS OF FACT:

Justin Stalder was employed by American Games from March 6, 2002 until May 15, 2009 as a full-time production worker on the 6:00 a.m. to 2:00 p.m. shift. He received a copy of the employer's attendance policy which provides for discharge of an employee who accumulates nine points. Some absences will not be counted against the employee if proper documentation is provided, such as funeral leave, emergency family illness or jury duty.

Mr. Stalder's last disciplinary action was on January 30, 2009, when he had accumulated nine points. The employer elected not to discharge him but gave him one-week unpaid suspension from February 2 through 6, 2009. When he returned to work on February 9, 2009, he was counseled his point total was at six, but if he reached the nine-point level again within the next 12-month period, he would be discharged.

Mr. Stalder called in absent to work on May 14, 2009. His son lives with his mother in Clarinda, Iowa, and had been hospitalized on May 13, 2009, and the claimant had drive to Clarinda, Iowa, to spend that night with him in the hospital. Even though Mr. Stalder consulted with the child's doctor, he did not ask for any documentation to bring to the employer. When he returned to work on May 15, 2009, he reported to Supervisor Ed Childers he had been absent the day before because he did not sleep the entire night while he was with his son in the hospital and

did not get back home to Council Bluffs, Iowa, until around 6:00 a.m. on May 14, 2009, and was too tired to come to work. He did not have any documentation of his son's hospitalization.

Mr. Childers consulted with Production Manger Tom Adams and the two of them went to the production floor around 7:00 a.m. and notified Mr. Stalder he was discharged. But Mr. Adams told the claimant if he could provide a doctor's statement regarding his son's hospital stay by 5:00 p.m., the discharge would be rescinded. The claimant had approximately ten hours to contact the doctor or the hospital to have a statement faxed to the employer, or even drive to Clarinda, Iowa, to get the documentation in person, but elected not to do so.

Justin Stalder has received unemployment benefits since filing a claim with an effective date of May 17, 2009.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 also had the company attendance policy and knew the absence on May 14, 2009, would be excused if he provided the necessary documentation from the doctor or the hospital, but elected not to do so. The employer generously allowed him an additional ten hours to provide the documentation to have the discharge rescinded but Mr. Stalder did not make any effort at all to obtain a statement. He could provide no reason why he failed to make a good-faith attempt to retain his job. The final absence must therefore be considered unexcused. In conjunction with his prior absenteeism this is considered excessive. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

Iowa Code section 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 June 15, 2009, reference 01, is reversed. Justin Stalder 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