

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SARAH E MICHAEL
Claimant

ARCHER-DANIELS-MIDLAND CO
Employer

APPEAL 15A-UI-13296-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/01/15
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Archer-Daniels-Midland, Co. (employer) filed an appeal from the November 23, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient evidence to show it discharged Sarah Michael (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on December 29, 2015. The claimant participated on her own behalf. The employer participated through Human Resources Manager Kristen Jones and Plant Superintendent Eric McVey.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as an Operator II beginning on May 27, 2014, and was separated from employment on November 2, 2015, when she was discharged. The employer has an attendance policy that states after an employee accrues seven attendance points, he or she will be discharged. An employee's no-call/no-show absence results in two points, a regular absence results in one point, and leaving early results in a half a point.

On September 21, 2015, the claimant was at four and a half points. On October 2, 2015, the claimant accrued another attendance point when she called off work to assist her grandparents who were experiencing mental and physical ailments. On October 6, 2015, Plant Superintendent Eric McVey issued the claimant a documented verbal written warning related to

the four and half attendance points. The claimant disagreed with some of her points and McVey agreed to investigate the points.

On October 21, 2015, the employer amended its call-in or on-call policy as it was having difficulty finding employees to cover shifts when other employees failed to show up for their shifts. The claimant was one of three in her area considered to be on-call when not working. The employer would list the three employees and rotate who would be contacted first, second, or third. Any employee who did not report to work when called would receive an attendance point.

On October 22, 2015, the claimant was called to report to work at 7:45 p.m. as another employee had not reported for his or her shift. The claimant was not able to go to work as she had gone out to dinner and consumed alcohol. The claimant was not the first person on the list, but the employer did not have a phone number for the first person on the list. The claimant received an attendance point for failing to report to work when called.

On October 31, 2015, the claimant was again contacted to report to work to cover for another employee. The claimant was assisting her grandparents and was unable to report to work. The employer issued her another attendance point, which resulted in her reaching seven points. On November 2, 2015, the claimant reported to work, but was directed to the Human Resources office. The claimant was notified that day she was being discharged for attendance.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,129.00, since filing a claim with an effective date of November 01, 2015, for the eight weeks ending December 26, 2015. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. In this case, the employer's policy related to on-call is not reasonable nor does it accurately reflect the duty an employee owes to an employer unless otherwise agreed upon by both parties. The employer hires employees to work when scheduled. The claimant does not owe the employer a duty to be on call at all times to cover for another employee. Under the employer's policy, as stated, the claimant would never be relieved of duties and could always be called into work. Any failure to appear would be considered an infraction of the attendance policy as the employer clearly stated any employee called in but who did not report would receive an attendance point.

Disregarding the lack of reasonableness to the employer's policy, the employer has failed to show willful misconduct regarding absenteeism. The claimant was not scheduled to work on

October 23, 2015 or October 31, 2015. She did not miss work for which she had been scheduled. It is reasonable for the claimant to be unavailable for time which had not been scheduled based on personal choices or obligations such as going out to dinner or assisting ailing grandparents. Because her failure to report to work were for reasonable grounds and the employer has failed to show the claimant was willfully absent for scheduled work on October 31, 2015, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and waiver of the employer's account are moot.

DECISION:

The November 23, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and waiver of the employer's account are rendered moot by the affirmance.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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