

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD L BRICKMAN
Claimant

APPEAL NO. 08A-UI-05398-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KERRY INC
Employer

OC: 04/29/07 R: 03
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Kerry, Inc. (employer) appealed a representative's May 29, 2008 decision (reference 07) that concluded Chad L. Brickman (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 23, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Mike Patterson appeared on the employer's behalf and presented testimony from one other witness, Rhonda Heerkes. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 29, 2007. He worked full time as a lead operator in the employer's Hudson, Iowa, soybean processing plant. His regular schedule was to work Monday through Wednesday from 6:00 a.m. to 6:00 p.m. and on Thursday from 6:00 a.m. to 10:00 a.m. His last day of work was April 14, 2008. The employer discharged him on April 18, 2008. The reason asserted for the discharge was excessive absenteeism.

The employer has a nine-point attendance policy. Prior to April 14, 2008 the claimant had accumulated 4.5 points, primarily due to personal illness. He had received a prior warning regarding his attendance on February 21, 2008.

On April 15 the claimant came in and spoke to his manager, Mr. Patterson. He indicated that a friend was being treated for a heart condition and he wanted to be available to be with his friend. Mr. Patterson agreed to the absence, but advised the claimant he would be assessed a point. Later that day Mr. Patterson spoke with a maintenance manager, who was not a manager of the claimant, who told Mr. Patterson that the claimant had told him that he was likely going to be out

the rest of the week. On the late afternoon of April 15 Mr. Patterson called the claimant to ask if he was going to be to work the next day. The claimant advised Mr. Patterson that he did wish to also take off for the same reason on April 16. Mr. Patterson again agreed, but again reminded the claimant he would be assessed a point and that this would mean he would be getting close to the discharge level. He told the claimant he would expect to see him on Thursday, April 17, and the claimant agreed.

On April 17 the claimant was a no-call, no-show for his shift, which was assessed at three points under the employer's attendance policy. With the two points that had been assessed for April 15 and April 16, this brought the claimant to 9.5 points, exceeding the discharge level. The claimant contacted the employer that afternoon, after the scheduled end time for his shift, as he had heard rumor that he may no longer have a job. Mr. Patterson was not available to discuss the situation that day, but on April 18 he spoke to the claimant and confirmed that the claimant had exceeded nine points and therefore was discharged. The claimant did not explain why he did not call or report to work on April 17.

The claimant established a claim for unemployment insurance benefits effective April 29, 2007. He reopened that claim with an additional claim effective April 20, 2008. Upon the expiration of his prior benefit year, the claimant established a subsequent benefit year effective April 27, 2008. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$761.00.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). The claimant's final absence was not excused and was not shown to be due to personal illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS,

350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's May 29, 2008 decision (reference 07) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 18, 2008. 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 overpaid benefits in the amount of \$761.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw