

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN MOBLEY
Claimant

APPEAL NO: 09A-UI-07098-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION
Employer

OC: 04-12-09
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 4, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 3, 2009. The claimant participated in the hearing. Terry Ubben, Human Resources Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Six and Claimant's Exhibits A through I were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time pack room laborer for Burke Marketing from February 9, 2009 to April 13, 2009. He was on a 60-day probation period and consequently was allowed two attendance points to use with termination resulting from the second one. The claimant was absent March 23, 2009, due to properly reported illness and received one point. He was tardy April 3, 2009, and received one-half point. On April 6, 2009, a friend of the claimant called the employer and said he would not be in because of "family issues." On April 7, 2009, he was a no-call no-show and on April 8, 2009, he was suspended pending review of his attendance record. During the review the employer learned the claimant was incarcerated April 5 and April 6, 2009. The claimant reported March 30, 2009, that he injured his foot at work March 27, 2009, and did not complete the required report until April 3, 2009, because he was waiting to see if it would get better without medical attention. He went to the emergency room April 9, 2009, and was excused from work April 9 through April 13, 2009. He testified his girlfriend called in for both of them April 7, 2009, and he believes his absences after his foot injury should all be excused. He argues that the employer was supposed to call him April 6, 2009, to tell him it scheduled a medical appointment for him so that date should be excused even though he was in jail and the employer did not have a current phone number for him until April 8, 2009. When

he told the employer about his injury it assigned another employee to work with him so he could help the claimant and the employer offers light duty work because it “prides itself on keeping people working and getting a paycheck.”

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was allowed one absence for the first 60 days of his employment and was notified at the time of hire of the policy stating two absences would result in termination. The claimant was absent due to properly reported illness March 23 and was tardy April 3, 2009. He was in jail April 5 and 6, 2009, which accounted for another point for a total of two and one-half points. The employer has no record of the claimant or his girlfriend calling in to report they would be absent April 7, 2009, and the claimant received one more point for a total of three and one-half points. The claimant’s point total exceeded the allowed number of points for a probationary employee. The claimant does not believe his absences April 3, 6 or 7, 2009, should be counted in his point total because they occurred after his reported work-related injury. He did not provide a note excusing him from work on those dates. The employer, however, assigned another employee to work with him to help him out and would have found light duty work if he had not been discharged due to his attendance. The claimant’s incident of tardiness April 3 and his absence due to being in jail April 6, 2009, were not excused absences. Even if the employer was supposed to call him about a doctor’s appointment April 6, 2009, the claimant did not provide a current phone number and was in jail at the time. While the claimant wanted to litigate his worker’s compensation case, this hearing only dealt with the unemployment issues. Even

assuming the claimant sustained a work-related injury, he did not see a physician or receive a note excusing him from work until April 9, 2009, when he went to the emergency room. Consequently, the final absence was not excused and the final absence, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The May 4, 2009, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as 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 claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs