

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSEPH JONG**

Claimant

**APPEAL NO: 13A-UI-13561-DWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BURKE MARKETING CORPORATION**

Employer

**OC: 11/17/13**

**Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge

**PROCEDURAL STATEMENT OF THE CASE:**

The employer appealed a representative's December 10, 2013 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because he had been discharged for nondisqualifying reasons. The claimant participated at the January 6 hearing. Shelli Seibert, the human resource supervisor, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is not qualified to receive benefits.

**ISSUES:**

Did the claimant voluntarily quit his employment for reasons that qualify him to receive benefits, or did the employer discharge him for work-connected misconduct?

Has the claimant been overpaid any benefits?

Is the claimant or employer required to pay back any overpayment of benefits?

**FINDINGS OF FACT:**

The claimant stated working for the employer in March 2011. He worked full time on third shift as a sanitation laborer. The last day the claimant worked was May 30, 2013.

In June, the claimant went on an approved vacation. He had approved time off until June 27, 2013. The claimant did not return to work on June 27, 2013.

The claimant went to Sudan where his wife lived. She was ill and was hospitalized on June 15. The employer understood the claimant extended his time off from work because he and his wife went to a fertility clinic. The claimant contacted the employer when he was in Sudan and told the employer that he needed to stay longer than June 27. The employer did not receive any paperwork indicating the claimant had to stay in Sudan for medical reason that would allow him to be covered under FMLA. The claimant's absences were not excused after June 27, 2013.

Since the claimant was not authorized to be absent after June 27, he started receiving attendance points in July. The employer usually terminates employees when they accumulate four attendance points. The employer terminated the claimant's employment on July 12 after he accumulated eight attendance points. The claimant did not return from Sudan until early November 2013.

The claimant established a claim for benefits during the week of November 17, 2013. He has filed claims for the weeks ending November 23, 2013, through January 4, 2014. He received his maximum weekly benefit amount of \$408.00 for each of these weeks. The employer and claimant participated at the fact-finding interview.

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if he voluntarily quits employment without good cause attributable to the employer, or an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §§ 96.5(1), (2)a. The employer discharged the claimant on July 12, 2013.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The claimant left the United States to go to Sudan to see his wife. He understood he was required to report back to work on June 27, 2013. While he was in Sudan, his wife was hospitalized. The claimant told the employer they went to a fertility clinic. When the claimant contacted the employer, the employer understood he was unable to report back to work on June 27 because he decided to stay longer for an elective medical treatment that is not covered by FMLA. As a result, the claimant was not on an approved leave after June 27.

Although the employer's policy informs employees they will be discharged if they accumulate four attendance points, the claimant accumulated eight attendance points before the employer discharged him on July 12, 2013. Without submitting documentation that his wife was hospitalized for an illness that would be covered under FMLA, the claimant established compelling reasons for staying in Sudan. But the evidence does not establish that his reasons for extending his vacation should be considered as excused absences. The employer discharged the claimant for reasons that do not qualify him to receive benefits. This decision is supported by the fact the claimant did not return from Sudan until early November 2013. Based

on the reasons for his employment separation, the claimant is not qualified to receive benefits as of November 17, 2013.

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. 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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)a, b.

Based on this decision, the claimant is not legally entitled to receive benefits as of November 17, 2013. He has been overpaid a total of \$2,856.00 in benefits he received for the weeks ending November 23, 2013, through January 4, 2014. The claimant is required to pay back the overpayment because the employer participated at the fact-finding interview.

**DECISION:**

The December 10, 2013 determination (reference 01) is reversed. The employer discharged the claimant for excessive, unexcused absenteeism which constitutes work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of November 17, 2013. 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 has been overpaid \$2,856.00 in benefits he received for the weeks ending November 23, 2013, through January 4, 2014. The claimant is required to pay back this amount.

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Debra L. Wise  
Administrative Law Judge

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Decision Dated and Mailed

dlw/css