

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DANIELLE S MCCULLEY**  
Claimant

**APPEAL NO. 12A-UI-10154-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SPARKLE SALON**  
Employer

**OC: 07/08/12**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

Sparkle Salon filed a timely appeal from a representative's decision dated August 9, 2012, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 10, 2012. Although duly notified, the claimant did not participate. The employer participated by Ms. Tiffiney Rodgers, Company Owner.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Danielle McCulley was employed by Sparkle Salon from March 2012 until July 5, 2012 when she was discharged from employment. Ms. McCulley worked as a part-time receptionist averaging 7 to 15 hours per week and was paid by the hour. Her immediate supervisor was Tiffiney Rodgers.

Ms. McCulley was discharged on July 5, 2012 for failure to report for scheduled work that day without providing proper notification to the employer of her impending absence. Prior to being discharged, the claimant had received numerous verbal warnings from her employer about her poor attendance and lack of punctuality. The claimant was placed on notice that her employment was in jeopardy if the problem continued. The claimant was issued a final warning about her attendance and punctuality approximately one week before being terminated. On July 5, 2012, the claimant failed to report and did not provide notification and the claimant had not secured a replacement or notified the employer of an attempt to do so.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

No aspect for the contract of employment is more basic than the right of an employer to expect employees will appear for work on the days and hour agreed upon. Recurrent failure to honor

that obligation evinces a substantial disregard for the employer's interests and thus may justify a finding of misconduct in connection with the employment.

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) holds that excessive, unexcused absenteeism is a form of misconduct. The Court held that the concept included tardiness, leaving early, etc. The Court further held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In the case at hand, the evidence in the record establishes that the claimant did not properly notify the employer of her impending absence on July 5, 2012 and that the claimant had been properly warned prior to being discharged. There being no evidence to the contrary, the administrative law judge concludes that the claimant was discharged for excessive, unexcused absenteeism after being warned. Unemployment insurance benefits are withheld.

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.

**DECISION:**

The representative's decision dated August 9, 2012, reference 02, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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