

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GREGORY M CALLAGHAN
Claimant

APPEAL NO. 10A-UI-12288-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 08/01/10
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated August 31, 2010, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on October 26, 2010. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Nikki Bruno participated in the hearing on behalf of the employer with a witness, Sarah Schneider.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a maintenance utility worker working on the night shift from August 26, 2009, to June 23, 2010. He was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled and were subject to termination after reaching ten attendance occurrences, provided that they had been given a level 3 attendance warning.

The claimant had been given a level 2 attendance warning on April 26, 2010, for having six occurrences. The claimant called in sick on June 24, June 28, June 29, July 2, July 3, and July 4. The claimant was scheduled to work on July 7. Before the claimant's shift, Sarah Schneider, human resources generalist, called him and said she noticed he had been calling in sick a lot. He responded, "yeah" and offered no further explanation. Schneider told the claimant that he was now at 13.5 occurrences and she was giving him his level 3 warning. She warned him that he would be discharged if he was absent again and asked if he was going to report to work that night. He said he would be reporting to work. He did not report to work on July 7 or notify the employer about his absence.

The employer discharged the claimant on July 7 for violating the employer's attendance policy and being absent without notice on July 7 and exceeding the number of absences allowed under the attendance policy.

The claimant filed for and received a total of \$4,512.00 in unemployment insurance benefits for the weeks between August 1 to October 23, 2010.

The claimant called in at 11:00 a.m. on October 27, 2010. He explained that he had been called into work for a meeting, and he had forgotten about the unemployment hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the hearing in this case should be reopened. The rules provide that a hearing can be reopened based on an emergency or other good cause that prevents a party from participating in a hearing. 871 IAC 26.8(3). No emergency or good cause has been shown to reopen the hearing here as the claimant forgot about the hearing.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

871 IAC 24.32(7) provides:

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 claimant was excessively absent. He did not provide any medical excuses for his final absences and did not properly notify the employer when he was absent on July 7. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The unemployment insurance law requires benefits to 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. But the overpayment will not be recovered when an initial determination to award benefits is reversed on appeal 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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated August 31, 2010, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise

eligible. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css