

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY W BAKER**  
Claimant

**APPEAL NO. 10A-UI-17387-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SIOUX CITY FOUNDRY CO**  
Employer

**OC: 10/17/10**  
**Claimant: Respondent (4-R)**

Section 96.5-2-a – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Section 96.4-3 – Able and Available  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department representative's decision dated December 17, 2010 reference 01, that held he was not discharged for excessive unexcused absenteeism on October 15, 2010, and that allowed benefits. A hearing was held on February 4, 2011. The claimant participated. Val Corbin (Furne), HR Director, and Steven Braun, Supervisor, participated for the employer. Employer Exhibit 1 was received as evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant began employment about April 20, 2009, and after a separation period, was re-hired on August 28, 2009. The claimant last worked as a full-time coding line operator on September 30, 2010.

The claimant was placed on restricted duty for a work-related back injury from September 17 to September 30. The claimant provided the employer a doctor's note on October 1 dated September 30, 2010 that stated he needed to remain off work until further notice due to an acute condition. The claimant went to his family physician due to a lower back/disc problem. The claimant was referred to a neurologist for treatment. The employer issued the claimant a series of warnings for excessive absenteeism from October 6 through October 8 for missing work from September 30 through October 8. The employer made requests for the claimant to initiate FMLA, and short-term disability.

Supervisor Braun called claimant on October 12 because he believed there was a misunderstanding about the claimant and the paperwork required for FMLA/short-term disability. The claimant denies he was requested to meet with the employer the following day. The

employer terminated claimant for excessive absenteeism by letter dated October 14 for the most recent absence of October 12 in light of prior warnings. The claimant did not come in for any meeting, and the employer's termination statement makes no reference to it.

The claimant has been instructed by his doctor(s) to do no bending, twisting, or lifting. The claimant has not provided the department with medical information as to whether there is work he can perform at this time. The claimant has been receiving benefits on his current claim.

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

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 administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on October 14, 2010, for excessive "unexcused" absenteeism.

The employer discharged claimant for excessive absences that are for excusable reasons, which is not misconduct. The claimant provided the employer with a doctor's excuse that he could not return to work after September 30. While the employer's policy might require an approved leave of absence to cover an extended absence from work, the period of the absence is due to a properly reported health condition that is certified by a doctor. The claimant's absence on and after October 1 is not misconduct.

The further issue is whether the claimant's failure to properly initiate FMLA (or other approved leave) and meet with the employer on October 13 is misconduct. The evidence does not establish the claimant's failure to meet with the employer on October 13 was a consideration for discharge. The claimant denies he was asked to meet with the employer, and the employer's termination letter does not refer to it as a reason for discharge.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19,

subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

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.

The administrative law judge further concludes the claimant is not eligible for benefits effective October 17, 2010, because he has failed to provide medical evidence that he is able to perform work.

The last doctor statement provided by the claimant is the one from his family physician dated September 30 that he needs to remain off work until further notice. The claimant acknowledges he is still under doctor treatment/care, and he has been instructed not to do any work that involves bending, twisting, or lifting. The claimant needs to provide medical information to the department that he is able and available to perform some gainful employment.

Since the claimant has received benefits, this matter is remanded to claims for a decision.

**DECISION:**

The representative's decision dated December 17 11, 2010 reference 01 is modified. The claimant was not discharged for misconduct in connection with employment on October 14, 2010. The claimant is not eligible for benefits effective October 17, 2010, because he is not able to perform work due to a chronic back ailment. The overpayment issue is remanded to claims.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/kjw