

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACOB A MAXWELL
Claimant

APPEAL NO. 10A-UI-06899-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR SERVICES INC
Employer

OC: 04/11/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Family Dollar, filed an appeal from a decision dated April 30, 2010, reference 01. The decision allowed benefits to the claimant, Jacob Maxwell. After due notice was issued a hearing was held by telephone conference call on June 29, 2010. The claimant participated on his own behalf. The employer participated by Human Resources Manager Leah Douglas.

The claimant elected to use a cell phone and was advised it was not recommended per the instructions on the notice of the hearing. He was notified if the connection was lost during the hearing the administrative law judge would not call back until he contacted the Appeals Section to indicate the cell phone was working again or to provide the number of another phone, but the hearing would proceed without his participation and might be over by the time he called back. The connection was lost some time prior to 9:20 a.m. which is when the administrative law judge first became aware of the situation. By the time the record was closed at 9:20 a.m. the claimant had not contacted the Appeals Section to rejoin the hearing.

ISSUE:

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

FINDINGS OF FACT:

Jacob Maxwell was employed by Family Dollar from December 15, 2008 until April 7, 2010 as a full-time shipping loader. He had received warnings regarding his absenteeism, the final one given January 11, 2010, when he had accumulated a total of 25 days. The warning advised him his job was in jeopardy if he accumulated 30 days, or 240 hours, in a rolling 12-month period.

Mr. Maxwell attempted to apply for FMLA on March 4, 2010, through Hewitt, the employer's third-party leave administrator. It was denied March 29, 2010, and he was notified of this by letter on March 30, 2010. The medical provider documentation was not complete. On March 31, 2010, Hewitt sent a blank form, and a copy of the incomplete form, to the claimant, highlighting the parts which needed to be filled out. On April 2, 2010, Hewitt representative went over the corrections with him by phone.

On April 5, 2010, the claimant left after working only one hour of his shift. He did not provide a doctor's excuse for that day and was notified on April 7, 2010, he was discharged for having missed a total of 30 days of work.

After that date the employer and Hewitt continued to try and work with the claimant to get him reinstated. Voice mail messages were left and certified letters sent asking him to make contact. He did not respond. Human Resources Manager Leah Douglas participated in the Iowa Workforce Development fact-finding interview on April 29, 2010, and after that she did make contact with Mr. Maxwell to go over what he needed to do to be reinstated. A certified letter was sent that same day summarizing the conversation and officially notifying him he would be reinstated if he provided the corrected forms to be approved for FMLA. The letter was received May 1, 2010, but the claimant has not contacted the employer to make the necessary arrangements as of the date of the hearing.

The record was closed at 9:20 a.m. At 9:31 a.m. the claimant called to request to be rejoined to the telephone hearing. He was advised the record had been closed.

Jacob Maxwell has received unemployment benefits since filing a claim with an effective date of April 11, 2010.

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(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 claimant had been advised his job was in jeopardy as a result of his absenteeism. He was given ample opportunity to provide the necessary documentation to be approved for FMLA but did not respond to voice mail messages or certified letters sent to him. He was aware he would be excused if he had either doctor's excuses on a day-by-day basis or provided the documentation needed for FMLA but failed to do both. He did not even respond to the employer's final notice of April 29, 2010, when informed he would be reinstated if he would contact Ms. Douglas to solve the problems with his FMLA application.

The claimant's unwillingness to take the necessary steps to preserve his job meant that his absences were counted against him and he accumulated 30 total days of unexcused absenteeism. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of April 30, 2010, reference 01, is reversed. Claimant is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs