

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAVETTA CLARK
Claimant

APPEAL NO: 12A-UI-03300-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS
Employer

OC: 01-01-12
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 23, 2012, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 17, 2012. The claimant participated in the hearing. Michelle Reyburn, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production worker for Farmland Foods from July 11, 2011 to November 4, 2011. The employer uses a point-based no fault attendance policy. Employees receive two points for a properly reported absence; one point for a properly reported absence accompanied by a doctor's excuse; one point for being over two hours tardy or leaving more than two hours early; and one-half point for being less than two hours tardy or leaving less than two hours early. Employees are discharged upon reaching 12 points. On July 15 and July 20, 2011, the claimant left more than two hours early and received one point for each occurrence; on July 25 and July 28, 2011, she left less than two hours early and received one-half point for each occurrence; on August 18, 2011, she was more than two hours tardy and received one point; on August 22, 2011, she was absent and provided a doctor's excuse and received one point; on August 23, 2011, she was less than two hours tardy and received one-half point; on August 29, 2011, she left more than two hours early and received one point; on September 20, 2011, she was absent and received two points; on September 27, 2011, she was less than two hours tardy and received one-half point; on October 10, 2011, she was absent and provided a doctor's excuse and received one point; on October 12, 2011, she was more than two hours tardy and received one point; and on October 26 and November 2, 2011, she was less than two hours tardy and received one-half point for each occurrence for a total of 12 points. The

claimant received a documented verbal warning September 1, 2011, upon reaching five points; a written warning September 23, 2011, upon reaching eight and one-half points; and a final written warning October 14, 2011, upon reaching ten points. The claimant was driving on a suspended license and all of her incidents of tardiness and leaving early were attributable to going to court for that issue, with the exception of approximately three occurrences when she had to appear in court due to a no-contact order she filed against her husband.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). All but three of the claimant's 12 points were due to her having to go to court. She may have accumulated up to at most three additional points because she filed a no-contact order against her husband, which is not her fault. While of course it is imperative the claimant appear in court when instructed, she would not have been required to do so if not for the fact she was driving on a suspended license which accounted for at least six points solely attributable to her suspended license and was her responsibility. Under these circumstances, the administrative law judge must conclude the employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits must be denied.

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. However, 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 employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The March 23, 2012, reference 03, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs