

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIKEL D STROUGH
Claimant

APPEAL NO. 09A-UI-15903-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

**Original Claim: 09/06/09
Claimant: Respondent (2-R)**

Section 96.5(2)a - Discharge

STATEMENT OF THE CASE:

The employer, Care Initiatives, filed an appeal from a decision dated October 12, 2009, reference 01. The decision allowed benefits to the claimant, Mikel Strough. After due notice was issued a hearing was held by telephone conference call on November 30, 2009. The claimant participated on his own behalf. The employer participated by Administrator Jeff Slotsky, DON Judy Johnson, and LPN Rachel Camden and was represented by TALX in the person of Lynn Corbiel. Exhibits One, Two, Three, Four, Five, Six, Seven, and Eight were admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Mikel Strough was employed by Care Initiatives from June 4, 2008 until March 5, 2009 as a part-time CNA. He received a copy of the employee handbook that sets out the attendance policy. Any employee who is unable to work a scheduled shift must call in at least two hours before the start of the shift and notify the charge nurse. Any employee who accumulates ten absences in a rolling 12-month period is subject to discharge.

The claimant accumulated nine absences by August 25, 2008, at which time he was given a three-day suspension. The absences were due to car problems, being arrested, and oversleeping. The employer attempted to resolve the claimant's attendance problems by moving him to the 2:00 p.m.-to-10:30 p.m. shift and making him part-time.

On February 28, 2009, the claimant called in at 1:05 p.m. and notified LPN Rachel Camden his car was "stuck." Ms. Camden offered to have her husband come and get him and he declined, saying he had already called his father. He said he would be in late, but then never came to work at all that day. He did not call back and say he would be absent the entire shift. Administrator Jeff Slotsky notified him he was discharged on March 5, 2009, his next working day.

Mikel Strough has received unemployment benefits since filing a claim with an effective date of September 6, 2009.

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. In spite of the warning, he was again absent without proper notice on February 28, 2009. He did not call in at least two hours before the start of the shift. When he did call, he said he would be late. When he realized he would not be in for the entire shift, he did not call again to notify the employer of this change.

The claimant was discharged for excessive, 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 October 12, 2009, reference 01, is reversed. Mikel Strough 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/kjw