

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GLORIA M ROMERO
Claimant

APPEAL NO. 11A-UI-06881-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM LTD
Employer

OC: 04/24/11
Claimant: Respondent (2R)

Section 96.5-2 – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated May 18, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 20, 2011. Claimant participated. Employer participated by Greg Stearns, human resources manager, and Maura Luna, daytime operations manager. The record consists of the testimony of Greg Stearns; the testimony of Maura Luna; the testimony of Gloria Romero; and Employer's Exhibits 1-3. Ike Rocha served as Spanish interpreter.

ISSUES:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides its customers with commercial janitorial services. The claimant was hired on January 14, 2010, as a full-time day porter. Her last day of work was April 27, 2011. She was terminated on April 28, 2011.

On April 22, 2011, the claimant requested permission to be off work on April 28, 2011, in order to attend a doctor's appointment. Greg Stearns and Maura Luna both told the claimant that she could not have that day off due to scheduling reasons. The client where the claimant worked required someone from the employer to be personally present and working and the employer could not accommodate the claimant's request. Ms. Luna and Mr. Stearns both told the claimant that if she did not come to work as scheduled at 8:00 a.m. on April 28, 2011, she would be terminated. Ms. Luna, who speaks Spanish, gave this information to the claimant in Spanish.

The claimant did not report to work at 8:00 a.m. and went to her doctor's appointment instead. When she did come to work at approximately 12:00 p.m., she was terminated.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The greater weight of the evidence established that the claimant requested time off to attend a doctor's appointment and permission was refused by the employer. The claimant was told that she must report to work or she would be terminated. The claimant elected to go to her doctor's appointment despite her employer's instruction. The claimant's appointment had been scheduled in advance and was not an emergency. The claimant could have rescheduled the appointment since she knew on April 22, 2011, that her employer would not allow her to miss work on April 28, 2011. She attended the appointment anyway knowing that her job was in jeopardy. The claimant's failure to come to work constitutes insubordination, which is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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 overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated May 18, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs