

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORY B GIEBELSTEIN
Claimant

APPEAL NO. 08A-UI-07394-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHEZIK-SAYERS OF IOWA INC
Employer

OC: 02/17/08 R: 03
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Chezik-Sayers Iowa, Inc. filed an appeal from a representative's decision dated August 8, 2008, reference 07, which held that no disqualification would be imposed regarding Cory Giebelstein's separation from employment. After due notice was issued, a hearing was held by telephone at 8:00 a.m. on September 2, 2008. The employer participated by Sarah Boulter, Administrative Assistant.

Mr. Giebelstein responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing. He did not contact the Appeals Bureau until approximately 10:10 a.m. on the day of the hearing. He had forgotten about the hearing and, therefore, had his telephone turned off. It was his responsibility to be aware of the hearing date and time and to be prepared to receive a call at the scheduled time. Because he did not have good cause for not being available at the scheduled time, the administrative law judge declined to reopen the hearing record.

ISSUE:

At issue in this matter is whether Mr. Giebelstein was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Giebelstein was employed by Chezik-Sayers of Iowa, Inc. from March until July 16, 2008. He worked full time as an attendant on the employer's car lot. He was discharged because of his attendance. The employer allows four personal days per year. An individual is subject to discharge if he receives three warnings regarding attendance.

Mr. Giebelstein was scheduled to work a half-day on July 3 but did not report for work or call the employer. When questioned, he indicated he did not think he had to work on July 3 because of the distance of the work in Iowa City from his home in Cedar Rapids. He used all four of his

personal days prior to July 16. He was verbally warned about his attendance on at least two occasions prior to July 16. On that date, he asked for two days off, July 17 and 18, to drive his father to an appointment. He was told he could not have the time off but told the employer he intended to take it anyway. He also told the employer he intended to take two weeks off in September when he got married. Based on his statements that he intended to take the time off in spite of being told he could not, along with other absences, Mr. Giebelstein was discharged.

Mr. Giebelstein reopened his claim for job insurance benefits effective August 3, 2008. He has received a total of \$776.00 in benefits since reopening his claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from receiving benefits if he was excessively absent on an unexcused basis. Properly reported absences that are for reasonable cause are considered excused absences. The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Mr. Giebelstein only worked for the employer approximately four months. He accumulated an unexcused absence on July 3 when he was a "no call/no show." The evidence of record does not establish any good cause for not reporting for work or not calling the employer to report the intended absence. In his four months of employment, Mr. Giebelstein had already exhausted his four personal days off. He intended to take an additional two days off for personal reasons on July 17 and 18 in spite of the fact that he had been warned about his attendance and had been told he could not have the two days off. Absences due to matters of purely personal responsibility are not excused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Therefore, the two days Mr. Giebelstein wanted off to drive his father to an appointment are unexcused absences.

Mr. Giebelstein's decision to take two days off for personal reasons after permission to do so was denied constituted a substantial disregard of the standards the employer had the right to expect. He already had at least one unexcused absence and had been warned about his attendance. Given the short period of employment, the administrative law judge considers three unexcused absences excessive. Excessive unexcused absenteeism constitutes misconduct within the meaning of the law. For the reasons cited herein, benefits are denied.

Mr. Giebelstein has received benefits since reopening his claim. Based on the decision herein, the benefits received now constitute an overpayment. Iowa Code section 96.3(7). Generally, an overpayment of job insurance benefits must be repaid. An overpayment that results from the reversal of a prior decision allowing benefits on a separation issue may be waived under certain circumstances. The overpayment may be waived if the claimant did not make any fraudulent statements during the fact-finding interview that resulted in the allowance of benefits and the employer failed to participate in the fact-finding interview. This matter shall be remanded to Claims to determine if Mr. Giebelstein will be required to repay benefits.

DECISION:

The representative's decision dated August 8, 2008, reference 07, is hereby reversed. Mr. Giebelstein was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten

times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. This matter is remanded to Claims to determine if Mr. Giebelstein will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css