

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN J LYSNE

Claimant

APPEAL NO. 07A-UI-10088-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BALL PLASTIC CONTAINER CORP

Employer

**OC: 09-16-07 R: 02
Claimant: Respondent (2)**

871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 23, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 19, 2007. The claimant did participate. The employer did participate through Jolene Welp, Human Resources Manager and Tim Malott, Production Manager, and was represented by Luci Reed of TALX UC eXpress. Employer's Exhibit One was received.

ISSUES:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a process technician full time beginning January 20, 2003 through September 14, 2007 when he was discharged.

The claimant was discharged from employment due to a final incident of absenteeism that occurred on September 9, 2007 when he was late to work by forty-five minutes. The claimant was late to work because he and his family had been out of town and were late getting back in to town. The claimant called the employer and told the supervisor on duty that he would be late coming in to work. The claimant was late because he had to put air in a tire before driving back home from his outing. The claimant was last warned on June 25, 2007, that he faced termination from employment upon another incident of unexcused absenteeism. Prior absences occurred as set out in Employer's Exhibit One. The claimant was given a last chance for attendance on June 25 and knew that if he was tardy to work even once before September 25, 2007 he would be discharged. None of the claimant's absences when he was on FMLA were used in making the determination to discharge him.

Claimant has received unemployment benefits since filing a claim with an effective date of September 16, 2007.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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(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).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The fact that an employee notifies the employer that he will be late to work does not make the tardiness acceptable or an unexcused absence. 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 unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The October 23, 2007, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Claimant is overpaid benefits in the amount of \$2,984.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css