

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON D DIRCKS

Claimant

APPEAL NO. 09A-UI-16465-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 09/27/09

Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct

Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Casey's Marketing Company filed an appeal from a representative's decision dated October 21, 2009, reference 01, which held that no disqualification would be imposed regarding Jason Dircks' separation from employment. After due notice was issued, a hearing was held by telephone on December 9, 2009. Mr. Dircks participated personally. The employer participated by Angie Himes, Manager.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Dircks was employed by Casey's from August 11, 2008 until September 11, 2009. He worked from 28 to 35 hours each week as a cook. He was discharged because of his attendance.

Mr. Dircks received a written warning on May 1, 2009 due to excessive tardiness. He was scheduled to be at work at 4:30 a.m. on June 28. He called at 8:05 a.m. to report that he had overslept. As a result of the absence, he was given another written warning. On August 24, he requested several days off and was told the employer would see what could be done. He was given 12 days off but indicated he would work a couple of those days to assist the employer. The manager spoke with him on September 15 and requested that he work September 16 and 17. Mr. Dircks indicated he would try to be there and agreed to call if he could not work. He did not report for work or contact the employer on either September 16 or 17. As a result, he was discharged from the employment.

Mr. Dircks filed a claim for job insurance benefits effective September 27, 2009. He has received a total of \$120.00 in benefits since filing the 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 benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused. Tardiness in reporting to work is considered a limited absence from work.

Mr. Dircks knew from the written warning of May 1, 2009 that his attendance was jeopardizing his continued employment with Casey's. Although the employer was unable to provide the dates on which he had been late, the fact remains that he had been warned. His absence of June 28 is unexcused as it was due to oversleeping. Oversleeping is not reasonable grounds for missing time from work. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The written warning he received as a result of the June 28 absence should have put him clearly on notice that he could be discharged if there were further attendance infractions.

In spite of the two prior warnings, Mr. Dircks had unexcused absences on September 16 and 17. The absences are unexcused because they were not properly reported. It was he who offered to work during time he had been granted off. He knew on September 15 that the employer expected him to work on September 16 and 17 or to call if he could not. All he was asked to do was to call the employer if he found he could not work. He failed to do this, leading the employer to believe the shift was covered. Given the prior warnings, the administrative law judge concludes that the two consecutive unreported absences are sufficient to establish excessive unexcused absenteeism.

Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect. It is, therefore, misconduct within the meaning of the law. As such, Mr. Dircks is disqualified from receiving job insurance benefits. He has received benefits since filing his claim.

Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated October 21, 2009, reference 01, is hereby reversed. Mr. Dircks was discharged by Casey's for misconduct within the meaning of the law. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Dircks will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css