

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARVIN R DILLON

Claimant

SEARS MANUFACTURING CO

Employer

APPEAL NO. 13A-UI-13372-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/10/13

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated November 27, 2013, reference 01, that held the claimant was not discharged for excessive unexcused absenteeism on November 8, 2013 and benefits are allowed. A hearing was held on December 24, 2013. The claimant did not participate. Trish Taylor, HR representative, and Diana Perry-Lehr, Employer Representative, participated for the employer.

ISSUES:

The issue is whether the claimant was discharged for misconduct.

The issue is whether claimant is overpaid unemployment benefits.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds that: The claimant was hired on February 20, 2012, and last worked as a full-time assembler on November 8, 2013. The claimant received the employer attendance policy that provides for a four-step disciplinary process. An employee may also be discharged for accumulating ten attendance points.

Claimant provided employer with a doctor note from the Hoover Chiropractic clinic excusing him from work for October 25. The HR department questioned what appeared to be an altered excuse date. The doctor office faxed a true copy to the employer showing October 28 as the excuse date.

The employer had previously issued steps one, two and three discipline to claimant for excessive absences as of April 22, 2013. The employer discharged claimant at a fourth step discipline on November 8, 2013 for the unexcused October 25 absence that meant he has ten points for termination.

Claimant was called twice at the phone number he had provided for the hearing and he did not answer. The mail box record was not established to leave a message.

Claimant has received benefits totaling \$2,040 for a five-week period ending December 14, 2013. The department fact finding record was not available for review to determine whether the employer participated.

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(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 administrative law judge concludes employer established misconduct in the discharge of the claimant on November 8, 2013, for excessive "unexcused" absenteeism.

The employer followed its four-step attendance disciplinary process and ten point threshold for attendance discharge in this matter. Claimant was issued a three-step attendance discipline in April 2013 and his unexcused October 25 altered doctor excuse absence triggered the fourth step termination that also put claimant at ten points (for termination). The final unexcused absence is more egregious due to the falsified doctor slip. Job disqualifying misconduct is established.

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 administrative law judge further concludes claimant is overpaid benefits \$2,040 for the five weeks ending December 14, 2013 due to the disqualification imposed in this matter. The issue whether claimant is required to repay this \$2,040 overpayment is remanded to claims for a determination. The fact-finding record was not available for review.

DECISION:

The decision of the representative dated November 27, 2013, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on November 8, 2013. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. Claimant is overpaid benefits \$2,040. The repayment overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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