

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANESSA R SEAMSTER
Claimant

APPEAL NO: 14A-UI-10138-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DALL-HAUS INC
Employer

OC: 08/17/14

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Dall-Haus, Inc. (employer) appealed a representative's September 19, 2014 (reference 01) decision that concluded Janessa R. Seamster (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 20, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Ryan Gibney appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in about January 2013. Since transferring to the employer's location in Hiawatha, Iowa effective March 1, 2013, she worked part time as a team member. Her last day of work was August 18, 2014. The employer discharged her on August 20, 2014. The reason asserted for the discharge was excessive absenteeism.

During the period from June 9 through August 9 the claimant had 12 absences. About six of those were properly called in due to illness, but the rest were not properly reported. She had been given a final written warning for attendance on August 14, 2014.

The claimant was scheduled for work on August 18, 2014. She was a no-call/no-show for that shift and she did not answer her phone when she was called by the employer. When she sought to report back to work on August 20, she indicated that she had been sick on August 18; however, she did not have an explanation as to why she had not called to report her absence. As a result of this additional no-call/no-show, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective August 17, 2014. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. Rule 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). However, the illness-related absence in this matter was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. The claimant had previously been warned that future absences could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will still be charged for the overpaid benefits. Iowa Code § 96.3-7-a,-b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. The matter of determining the amount of the overpayment and whether the claimant the overpayment is subject to recovery and the employer's account subject to charge under Iowa Code § 96.3-7-b, including a determination as to whether the employer had participated in the fact-finding interview, is remanded the Benefits Bureau.

DECISION:

The representative's September 19, 2014 (reference 01) decision is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 20, 2014. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The matter is **REMANDED** to the Benefits Bureau for investigation and determination of the overpayment, participation, and chargeability issues.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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