

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUAN L BENDICKSON**

Claimant

**APPEAL NO. 12A-UI-02089-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MANPOWER INTERNATIONAL INC**

Employer

**OC: 12/25/11**

**Claimant: Respondent (4-R)**

Iowa Code Section 96.19(38)(c) – Temporary Layoff  
871 IAC 24.32(9) – Disciplinary Suspension  
Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 16, 2012, reference 01, decision that allowed benefits effective December 25, 2011 based on an Agency conclusion that the claimant was temporarily laid off at that time. After due notice was issued, a hearing was held on March 19, 2012. Claimant Juan Bendickson participated. Stacy Rieken represented the employer. The parties waived formal notice on whether the claimant's February 2012 separation was a voluntary quit for good cause attributable to the employer or a discharge for misconduct in connection with the employment.

**ISSUES:**

Whether Mr. Bendickson was temporarily laid since he established the claim for unemployment insurance benefits that was effective December 25, 2011.

Whether Mr. Bendickson's February 2012 separation was a voluntary quit for good cause attributable to the employer or a discharge for misconduct in connection with the employment.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Juan Bendickson began getting work through Manpower International in 2009. Mr. Bendickson most recently performed work for Manpower in a part-time assignment at Aspen Hills, where he helped make cookie dough. Mr. Bendickson started that assignment in July 2011. Effective December 15, 2011, Mr. Bendickson was temporarily laid off from the part-time assignment due to a scheduled plant shut down. Mr. Bendickson was recalled to the assignment on January 3, 2012. Mr. Bendickson was scheduled to work on January 3, 4 and 5, 2012 and worked those scheduled shifts in their entirety.

Mr. Bendickson would usually learn his weekly work hours by means of a phone call from Manpower staff at the end of the prior week. If Mr. Bendickson happened to work the prior

week, Mr. Bendickson could learn his weekly work hours by looking at the schedule posted at Aspen Hills.

After January 5, Mr. Bendickson was next scheduled to work on January 10. Mr. Bendickson was absent that day and did not contact either Manpower or Aspen Hills to report that he would be absent. The established absence reporting policy required that Mr. Bendickson notify either Manpower or Aspen Hills prior to the start of the shift if he needed to be absent. Mr. Bendickson was aware of this policy.

Based on the January 10 absence, the employer did not schedule Mr. Bendickson to work again until January 30. In other words, Mr. Bendickson was on a disciplinary suspension from January 11 through 29.

On January 30, 2012, Mr. Bendickson notified Manpower Staffing Specialist Stacy Rieken that he would be absent due to lack of a babysitter. On January 31, Mr. Bendickson was scheduled to work, but was absent without notifying the employer or Aspen Hills. On February 1, production at Aspen Hills was canceled for the day. On February 2, Mr. Bendickson appeared and worked his entire shift.

Mr. Bendickson was next scheduled to work on February 6 and 7. On February 6 and 7, Mr. Bendickson was absent and failed to notify Manpower or Aspen Hills. Mr. Bendickson had access to a phone. Instead of contacting Manpower or Aspen Hills, Mr. Bendickson asked a coworker to let Aspen Hills know he would be absent. The employer, Manpower, had never authorized Mr. Bendickson to have a coworker provide notice of Mr. Bendickson's need to be absent.

Based on Mr. Bendickson's absences on February 6 and 7, the employer did not schedule Mr. Bendickson to work again until February 20. In other words, Mr. Bendickson was on a disciplinary suspension from February 8 through 19.

On February 20, Mr. Bendickson worked his shift. On February 21, Mr. Bendickson was absent without notifying the employer. Based on this incident and the earlier absences, the employer removed Mr. Bendickson from the assignment and sent another worker to Aspen Hills instead. Though Mr. Bendickson received no more calls from Manpower about upcoming work hours or about his absence, he took no steps to contact Manpower about the status of the assignment.

Mr. Bendickson next made contact with Manpower on March 15, 2012 for the sole purpose of having Manpower complete earnings documentation Mr. Bendickson needed as part of an application to the Department of Human Services to obtain food stamps.

#### **REASONING AND CONCLUSIONS OF LAW:**

An individual shall be deemed *temporarily unemployed* if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed *due to a plant shutdown, vacation, inventory, lack of work or emergency* from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c). This same sort of analysis applies to part-time workers as well. See 871 IAC 24.23(26).

Iowa Administrative Code rule 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence establishes that Mr. Bendickson was temporarily laid off during the period of Thursday, December 15, 2011 through Monday, January 2, 2012. Mr. Bendickson was eligible for benefits during the weeks that ended December 17, 24, and 31, 2011, provided he was otherwise eligible. Manpower's account may be charged for those benefits.

Mr. Bendickson was not temporarily laid off during the week that ended January 7, 2012 and was not eligible for benefits for that week.

During the period of January 11 through 29, Mr. Bendickson was on a disciplinary suspension. At that point, the suspension was based only on the January 10 unexcused absence. That one absence would not constitute misconduct and would not disqualify Mr. Bendickson for unemployment insurance benefits. Mr. Bendickson was eligible for benefits for the weeks that ended January 14, 21 and 28, provided he was otherwise eligible. Manpower's account may be charged for those benefits.

During the week that ended February 4, 2012, Manpower had three days work for Mr. Bendickson, though Mr. Bendickson only appeared for one day. Mr. Bendickson was not laid off during the week that ended February 4 and, therefore, would not be eligible for benefits under the theory that he was laid off.

With regard to that same week ending February 4, 2012, Mr. Bendickson had two unexcused absences. Both were based on a lack of childcare. During the weeks that ended February 11 and 18, Mr. Bendickson was again on a disciplinary suspension. At this point, there were three recent unexcused absences. At this point, the unexcused absences were excessive and constituted misconduct in connection with the employment. Mr. Bendickson was not eligible for benefits for the weeks ending February 11 and 18. The employer's account will not be charged for benefits paid for those weeks.

During the week that ended February 25, Mr. Bendickson had yet another unexcused absence and was discharged from the employment. The discharge was based on excessive unexcused absences. On February 22, 2012, Mr. Bendickson was discharged for misconduct. Based on the February 22, 2012 discharge, Mr. Bendickson is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Bendickson for the period on or after February 22, 2012.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's *separation* from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will

remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The Agency representative's February 16, 2012, reference 01, decision is modified as follows. The claimant was temporarily laid off during the weeks that ended December 17, 24 and 31, 2011, and is eligible for benefits for those three weeks, provided he is otherwise eligible. The employer's account may be charged for those benefits.

The claimant was not temporarily laid off during the week that ended January 7, 2012 and was not eligible for benefits for that week.

During the weeks that ended January 14, 21 and 28, 2012, the claimant was suspended for no disqualifying reason and was eligible for benefits, provided he was otherwise eligible. The employer's account may be charged for those benefits.

During the week that ended February 4, 2012, Manpower had three days work for Mr. Bendickson, though Mr. Bendickson only appeared for one day. Mr. Bendickson was not laid off during the week that ended February 4 and, therefore, would not be eligible for benefits under the theory that he was laid off.

During the week that ended January 7, 2012, the claimant was not temporarily laid off and was not eligible for benefits.

During the weeks that ended February 11 and 18, the claimant was suspended for misconduct and was not eligible for benefits.

Effective February 22, 2012, the claimant was discharged for misconduct in connection with the employment. Based on the discharge, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant for the period on or after February 22, 2012.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs