

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA RICHARDSON
Claimant

APPEAL NO: 13A-UI-08426-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BILL'S FOREST CITY SUPERMARKET INC
Employer

OC: 06/23/13
Claimant: Respondent (2/R)

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Bill's Forest City Supermarket, Inc. (employer) appealed an unemployment insurance decision dated July 17, 2013, reference 02, which held that Linda Richardson (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 22, 2013. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through Tom Barkema, Store Manager. Employer's Exhibits One through Seven were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time courtesy counter/checker from September 5, 1984 through June 19, 2013 when she was discharged from employment due to excessive unexcused absenteeism. The employer's attendance policy provides that employees must notify the store manager if unable to work and absences must be reported prior to the beginning of the employee's shift. The claimant last worked on June 4, 2013 and failed to properly report her absences on June 5, 6, 7, 10, 11, 12, 14, and 15, 2013. She called in every day except for June 15, 2013 but she never spoke with the manager as required and sometimes did not call in prior to her shift. The claimant most often spoke with the bakery personnel but never bothered to call back in to speak with the manager. She had reported on June 11, 2013 that she was going in for medical tests.

The claimant called in for the first time and spoke with the manager on June 17, 2013 and called and spoke with the owner on June 18, 2013. She said she would return to work on June 19,

2013 and was advised she needed a doctor excuse and verification. The claimant failed to show for her shift on June 19, 2013 and failed to report her absence prior to when the shift began so was considered a no-call/no-show. The employer prepared a termination letter and sent it by certified mail on June 19, 2013 but the claimant never signed for it. At 5:08 p.m. on June 19, 2013, the claimant's physician faxed in a medical excuse with the same date indicating that she was being treated and was excused from work for ten days. The medical excuse said she could return to work on June 25, 2013. The employer requested additional information since the medical excuse was somewhat confusing but never received any further medical notes or explanation. The claimant had received a previous written warning for attendance.

The claimant filed a claim for unemployment insurance benefits effective June 23, 2013 and has received benefits after the separation from employment. The employer participated in the fact-finding interview and provided documentary evidence while the claimant failed to participate in both the interview and the hearing.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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. 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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on June 19, 2013 for 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. 871 IAC 24.32(7).

Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant's absences might have been due to illness but were not properly reported. She had been previously warned about her attendance. The final absences, in combination with the claimant's history of absenteeism, are considered excessive. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits she has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. Iowa Code § 96.3-7(a) and (b).

In the case herein, a waiver cannot be considered because the employer participated in the fact-finding interview. See 871 IAC 24.10. Accordingly, the case is remanded to determine the amount of the overpayment which cannot be waived and the employer's account is not chargeable.

DECISION:

The unemployment insurance decision dated July 17, 2013, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for determination of the overpayment issue. The employer's account is not subject to charge.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css