

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASPER BRUFORD
Claimant

APPEAL NO. 11A-UI-01191-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER'S SERVICE BUREAU INC
Employer

**OC: 01/02/11
Claimant: Respondent (2R)**

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated January 28, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 4, 2011. Claimant participated. Employer participated by Joe Rausenberger, superintendent. The record consists of the testimony of Joe Rausenberger; the testimony of Jasper Bruford; and Employer's Exhibits 1-3.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant was overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a contract labor company. The claimant was hired on June 2, 2010, as a full-time laborer. The claimant's last day of work was December 16, 2010. The claimant was terminated on December 21, 2010, for poor attendance.

The claimant was absent on December 8, 2010; December 13, 2010; December 15, 2010; December 20, 2010, and December 21, 2010. He was scheduled to be at work at 10:20 p.m. The claimant was absent on December 20, 2010, and December 21, 2010, because his car was broken down. He was absent on December 8, 2010, because he was pulled over for speeding. The claimant was absent on December 13, 2010, and December 15, 2010, due to one of his children being sick.

The claimant was given a written warning on October 8, 2010, concerning his attendance. He was told that if his attendance did not improve he would be terminated. (Employer's Exhibit 1).

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(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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7) The employer has the burden of proof to show misconduct.

The evidence in this case established excessive absenteeism. The issue is whether the evidence established unexcused absenteeism as the absenteeism must be both excessive and unexcused to show misconduct. The claimant's testimony on why he was absent on a given day changed throughout the course of his testimony. He contradicted himself and changed his testimony so many times that the administrative law judge cannot place any credibility on that

testimony. The only date on which he did not change his testimony was December 21, 2010, when he admitted that he called off work because of a transportation problem. The second time he was asked about December 20, 2010, he said it was also due to his car. The first time he testified about December 8, 2010, he said he had a doctor's appointment for his children. When asked why he had a doctor's appointment for his children at night, he altered his testimony to say that he took one of his children to the emergency room. He then changed that date to December 13, 2010, and said he was absent on December 8, 2010, because he had a speeding ticket.

After carefully considering all of the testimony in this case, the administrative law concludes that the employer has established excessive unexcused absenteeism. At least three absences, including the final two absences, were due to matters of personal responsibility. The claimant may have notified his employer that he would be absent, but that does not change an unexcused absence into an excused absence. Since misconduct has been shown, benefits are denied.

The next issue is overpayment of benefits.

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 overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated January 28, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid

wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css