

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOAN M DIAZ**  
Claimant

**APPEAL NO. 09A-UI-06510-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SCHENKER LOGISTICS INC**  
Employer

**OC: 03/22/09**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayments

**STATEMENT OF THE CASE:**

Schenker Logistics, Inc. filed an appeal from a representative's decision dated April 14, 2009, reference 01, which held that no disqualification would be imposed regarding Joan Diaz' separation from employment. After due notice was issued, a hearing was held by telephone on May 22, 2009. The employer participated by Nicki Brick, Human Resources Generalist. Mr. Diaz did not respond to the notice of hearing.

**ISSUE:**

At issue in this matter is whether Mr. Diaz was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Diaz began working for Schenker Logistics, Inc. on July 14, 2008 as a full-time case pick operator. He was discharged because of his attendance.

Mr. Diaz received a written warning regarding his attendance on October 16, 2008. He received an additional written warning after he was absent without calling in on December 6. He was absent on March 10 and 11 because he was in jail. He was not scheduled to work on March 12 or 13. His separation was due to the fact that he was absent without calling in on March 14 and 15. A letter was sent to Mr. Diaz on March 16, 2009 advising that he no longer had employment. Attendance was the sole reason for the separation.

Mr. Diaz filed a claim for job insurance benefits effective March 22, 2009. He received a total of \$244.00 in benefits after filing the claim.

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

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Mr. Diaz received warnings about his attendance on October 16 and December 6. Therefore, he was clearly on notice that his attendance was jeopardizing his continued employment. In spite of the warnings, he accumulated four unexcused absences in March. Absences due to matters of personal responsibility, such as incarceration, are not excused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Therefore, Mr. Diaz' absences of March 10 and 11 are unexcused. The absences of March 14 and 15 are unexcused because they were not reported to the employer. The evidence failed to establish any justification for Mr. Diaz' failure to call the employer on March 14 and 15.

The administrative law judge considers four unexcused absences during a one-week period to be excessive. Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect and is, therefore, misconduct within the meaning of the law. For the reasons cited herein, benefits are denied.

Mr. Diaz has received benefits since filing his claim. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

## **DECISION:**

The representative's decision dated April 14, 2009, reference 01, is hereby reversed. Mr. Diaz was discharged for disqualifying misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. This matter is remanded to Claims to

determine the amount of any overpayment and whether Mr. Diaz will be required to repay benefits.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/CSS