

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARKUS R MULLENGER**

Claimant

**APPEAL NO. 09A-UI-11779-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE BON-TON DEPARTMENT STORES INC**

Employer

**Original Claim: 06/21/09  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

The Bon-Ton Department Stores, Inc. filed a timely appeal from a representative's decision dated August 6, 2009, reference 03, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was scheduled for and held on September 1, 2009. Although duly notified, the claimant did not respond to the hearing notice and did not participate. The employer participated by Ms. Maureen Jenssen, assistant store manager.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Markus Mullenger was employed as a part-time sales associate for The Bon-Ton Department Stores, Inc. from June 5, 2008, until March 7, 2009, when he was discharged for job abandonment after failing to report or provide notification to the employer for three consecutive workdays. The claimant was aware of the company attendance policies and had been warned prior to his discharge. Prior to the claimant's most recent attendance infractions, he had accumulated 68 instances of tardiness.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes that the claimant's separation from employment took place under disqualifying conditions.

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.

The evidence in the record establishes that Mr. Mullenger had been repeatedly absent and tardy in reporting to work and had been repeatedly warned by the employer prior to being discharged after he failed to report for scheduled work for three consecutive work shifts without providing any notification to the employer regarding his impending absences. The evidence in the record establishes that the claimant was aware of company policy and was aware that his employment was in jeopardy. He was discharged when he violated company policy by failing to report or to provide notification as required. Benefits are withheld.

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 issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for determination.

**DECISION:**

The representative's decision dated August 6, 2009, reference 03, is reversed. Markus Mullenger is disqualified and benefits are withheld until he has worked in and earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for determination.

---

Terence P. Nice  
Administrative Law Judge

---

Decision Dated and Mailed

kjw/kjw