

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A BUSH
Claimant

APPEAL NO. 10A-UI-09337-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS
Employer

OC: 05/30/10
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

West Liberty Foods (WLF) filed an appeal from a representative's decision dated June 24, 2010, reference 01, which held that no disqualification would be imposed regarding Michael Bush's separation from employment. After due notice was issued, a hearing was held by telephone on August 17, 2010. Mr. Bush participated personally. The employer participated by Amanda Cosgrove, Quality Assurance Supervisor, and Monica Dyar, Human Resources Supervisor.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Bush was employed by WLF from February 2, 2009 until May 28, 2010. He worked full time as a quality assurance technician. He was discharged because of his attendance. Attendance infractions fall off an individual's record after one year.

Mr. Bush was absent for personal reasons on May 30, July 10, August 7, and October 5, 2009, and January 20, 2010. He also had absences due to illness on July 1 and December 9, 2009. He was 18 minutes late on June 9, 2009 because he was "running late." He was 42 minutes late on March 25, 2010 because he did not have a ride. Mr. Bush received warnings about his attendance on August 23, 2009; and February 24, March 25, and April 30, 2010. The decision to discharge was based on the fact that he was late on May 22 and May 23.

Prior to May 17, 2010, Mr. Bush's workday began at 3:45 p.m., Monday through Sunday. The quality assurance supervisor held a meeting with all the technicians on May 17 and advised that the new reporting time would be 3:30 p.m. She followed up the meeting with an email to all technicians on the same day, May 17. Mr. Bush attended the meeting but did not read the email. He always had the same start time each day regardless of what tasks were expected to be performed that day. The supervisor did not indicate that the new starting time would only be

applicable to certain days of the week. Mr. Bush was 11 minutes late on May 22 and 10 minutes late on May 23. All other technicians reported to work at the new start time on May 22 and 23. He was discharged on May 28, 2010.

Mr. Bush filed a claim for job insurance benefits effective May 30, 2010. He has received a total of \$2,776.00 in benefits since 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. Tardiness in reporting to work is considered a limited absence from work.

Mr. Bush had at least four absences for personal reasons while employed by WLF. Absences due to matters of purely personal responsibility are not excused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). He had two occasions of tardiness prior to the final incidents that prompted this discharge. Neither incident was for reasonable cause and, as such, both are unexcused. Mr. Bush had been amply warned that his attendance was jeopardizing his continued employment with WLF. In spite of having been warned and knowing that his job was at stake, Mr. Bush accumulated two additional incidents of tardiness on May 22 and 23.

Mr. Bush always had the same starting time each day he worked regardless of what work was to be performed that day. He attended a meeting in which he was told he would have a new starting time without any indication that the new time was limited to only certain days of the week. There was no reason for Mr. Bush to guess at or assume his start time was still the old time for Saturday and Sunday, May 22 and May 23. The evidence does not establish any justification for the back-to-back occasions of tardiness. Given the warnings he had received and the attendance history, the administrative law judge concludes that excessive unexcused absenteeism has been established by the evidence. As such, Mr. Bush is not entitled to job insurance benefits.

Mr. Bush has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. 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 June 24, 2010, reference 01, is hereby reversed. Mr. Bush was discharged by WLF for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Bush will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css