

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIM A FRYE
Claimant

APPEAL NO. 13A-UI-02338-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM JANITORIAL SERVICES NORTH
Employer

OC: 01/20/13
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

ABM Janitorial Services North filed a timely appeal from a representative's decision dated February 19, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 26, 2013. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Ms. Denice Norman, Hearing Representative, and Mr. Douglas Hartman, Account Lead. Employer's Exhibits One through Seven were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Kim Frye was employed by ABM Janitorial Services North from February 26, 2010 until January 16, 2013 when she was discharged from employment. Ms. Frye was employed as a full-time janitorial shift leader and was paid by the hour. Claimant's immediate supervisor was Mr. Douglas Hartman, Account Lead.

The claimant was discharged because her attendance in the month preceding her discharge had been irregular and because the claimant failed to follow the required call-in procedures to report her impending absences, departures or late arrivals. Ms. Frye was aware of the company policy which required employees to notify their supervisors four hours before the beginning of the work shift of any impending absences or tardiness when possible.

On December 20, Ms. Frye left the work shift without notifying her supervisor. On December 21, 2012, Mr. Hartman, her supervisor, met with the claimant about leaving during the work shift and questioned her about not being seen for several hours during the work shift on December 18, 2012. On December 23, 2012, Ms. Frye did not report or provide any

notification of her impending absence that day. On December 24, 2012, Ms. Frye called in after the beginning of the work shift to report that she would not be reporting to work. On January 2, 2013, the claimant arrived at work late and asked to leave early. On January 3, 2013, the claimant called in sick and the employer accommodated her by changing the claimant's work schedule at Ms. Frye's request. Ms. Frye worked January 6 and 7 but failed to report or provide notification on January 8, 2013. On January 9, 2013, the claimant indicated that she would be absent that day and that she had missed the preceding day due to transportation issues. On January 10, 2013, the claimant called in 14 minutes before the beginning of her shift. On January 13, 2013, Ms. Frye called in 26 minutes after the beginning of her work shift indicating she would be late that day. After reporting to work, co-workers indicated that Ms. Frye was not seen at the work location for a three-hour period.

On December 30, 2012, the claimant was issued a written warning for excessive absenteeism and her failure to properly report her impending absences. Claimant was warned on December 21, 2012. Claimant was warned for leaving her shift without authorization.

Based upon the claimant's repetitive failure to report to work, report timely or complete her work shifts and because of her repeated failure to provide proper notification after being warned, a decision was made to terminate Ms. Frye from her employment. Although the claimant had been given a number of opportunities to supply medical documentation to support her need to be absent from work, Ms. Frye failed to present any medical documentation.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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(7) provides:

(7) 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The Court further held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer. The Court in the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of "personal responsibility such as transportation problems and oversleeping" are considered unexcused.

Inasmuch as the evidence in the record establishes that the claimant was aware of the company's call-in policy and the claimant had been warned, the claimant's recurrent absence, tardiness or leaving early without proper notification to the employer showed a willful disregard of the employer's interests and reasonable standards of behavior that the employer had a right to expect of its employees under the provisions of the Employment Security Act. The last event that caused the claimant's discharge took place when Ms. Frye reported to work two hours late on January 13, 2013 without properly notifying the employer. Claimant's reason for being late that day was because she "overslept." The administrative law judge concludes based upon the evidence in the record that the claimant's absences were excessive and that the claimant was properly warned. The final incident that caused her discharge took place when the claimant overslept and reported to work late for that reason. There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant was discharged under disqualifying conditions. Unemployment insurance 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.

DECISION:

The representative's decision dated February 19, 2013, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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