

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIANA E SABBY

Claimant

APPEAL NO. 12A-UI-12621-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASON CITY FORD LINCOLN

MERCURY INC

Employer

OC: 09/16/12

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Mason City Ford Lincoln Mercury Ford Inc. filed a timely appeal from a representative's decision dated October 15, 2012, reference 03, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 12, 2012. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Mr. Don O'Connor, General Manager and Ms. Tami Saidat. Additional available witnesses were Luke Schmitt and Krystal Adkins. Employer's Exhibits A, B and C were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Briana Sabby was employed by Mason City Ford Lincoln Mercury Inc. from May 21, 2012 until September 7, 2012 when she was discharged for repetitive tardiness after being warned. Ms. Sabby was employed as a full-time receptionist/greeter and was paid by the hour. Her immediate supervisor was Ms. Tami Saidat.

Ms. Sabby was discharged from her employment based upon ongoing and repetitive tardiness in reporting for scheduled work. Ms. Sabby had been tardy in reporting for work approximately 60 percent of her scheduled working days. In an effort to keep the claimant as an employee, the company specifically met with Ms. Sabby on July 13, 2012 and warned her. The warning at that time included a warning about the claimant's lack of punctuality and its affect upon the company.

When the claimant's punctuality did not improve, the claimant was issued a final warning on August 29, 2012. At that time the claimant was warned that continuing to report to work late would result in her termination from employment.

Although the claimant had received a final warning on the matter, Ms. Sabby continued to report to work late. The claimant reported to work late the very next day after the final warning and again reported late on September 7, 2012. At that time a decision was made that the employer would no longer tolerate the claimant's failure to adhere to her regular scheduled working hours and discharged Ms. Sabby from her employment.

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.

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. App. 1992).

The Supreme Court of 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 be both excessive and unexcused and that the concept includes tardiness, leaving early, etcetera.

The administrative law judge finds that the claimant's tardiness was excessive and unexcused and that the claimant was properly warned before being discharged.

No aspect for the contract of employment is more basic than the right of the employer to expect employees will appear for work on the hour and day agreed upon. Repetitive failure to honor that obligation shows a disregard for the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees under the provisions of the Iowa Employment Security Law.

The employer has sustained its burden of proof in showing that the claimant's discharge took place 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 October 15, 2012, reference 03, is reversed. The 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 the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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