

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUHAVA T PERRY

Claimant

APPEAL NO. 13A-UI-05706-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA

Employer

OC: 04/21/13

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated May 9, 2013, reference 01, that held the claimant was not discharged for excessive unexcused absenteeism on April 22, 2013 and benefits are allowed. A telephone hearing was held on July 25, 2013. The claimant, and Union Representative, Nancy Preuss, participated. Dale Winnike, Nurse Manager, and Debra Hughes, HR/Benefit, participated for the employer. Claimant Exhibit A and Employer Exhibit 1 and 2 was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds that: The claimant worked as a nurse aide from August 1, 2011 to April 23, 2013. The employer issued claimant progressive discipline for absences she reported as illness. The employer counted the absences against claimant because she did not have benefit time to cover them. The most recent warning with a five-day suspension occurred on November 21, 2012.

Claimant suffered back, neck and shoulder work-related (worker's compensation) injuries on December 7, 2012. She missed some work, was put on restriction and light-duty work. She was issued an unrestricted release to return to work on April 4, 2013 from her worker's compensation injury though claimant expressed concerns related to pain and anxiety.

Claimant came to work on Monday, April 8, and met with supervisor Winnike about her release. About one hour later, the employer could not locate her and it learned she had left work without authorization. The employer clocked her out at 4:00 p.m. Claimant came into work the next day at her start time 3:00 p.m. After speaking with supervisor Winnike and HR representatives, she requested union representation and left the meeting. She left work without authorization, failed to clock-out and the employer had to so about 3:45 p.m.

Claimant called in absences for April 10, 11 and 12 due to reported illness. Although she states she was very ill, she did not see a doctor until April 12 who excuses her from work to April 13. The employer let claimant know on April 12 it wanted to schedule an investigatory meeting for April 18 as it was questioning her April 8 – 12 absences. The employer had requested a meeting for April 12 and 13.

The employer terminated claimant when she came to work on April 23, 2013 for leaving work without authorization and unscheduled absences.

Claimant has been receiving benefits on her current claim.

REASONING AND CONCLUSIONS OF LAW:

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(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 administrative law judge concludes employer established misconduct in the discharge of the claimant on April 23, 2013, for leaving work without authorization.

While properly reported absences due to illness is not deemed excessive unexcused absenteeism, leaving work without permission and failing to clock-out is. Claimant has a spurious absenteeism record. She is given the benefit of the doubt with absences covered by doctor excuses. Her doctor questioned her work restrictions complaint due to pain and anxiety when he examined her on April 4 to the point he ignored her and he placed no restriction on her return to work activity.

There is no evidence claimant was suffering from serious illness that would preclude from asking supervisor permission to leave work for two consecutive days. She waited until April 12 to see a doctor and he did not excuse her for the prior days. Claimant had been warned and disciplined about her excessive absenteeism. While it is not considered as the basis for misconduct based on employer policy she had no benefit time to cover the absences, it does put claimant on notice she has an attendance problem.

The two consecutive days of walking off the job does constitute job disqualifying misconduct.

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.

Since claimant has been disqualified in this matter after having received benefits, the overpayment issue is remanded to Claims for a decision.

DECISION:

The decision of the representative dated May 9, 2013, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on April 23, 2013. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css