

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GIOVANNI SAENZ

Claimant

APPEAL NO. 06A-UI-10105-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

**OC: 09-10-06 R: 02
Claimant: Respondent (2R)**

871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 2, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 16, 2006. The claimant did participate. The employer did participate through (representative) Terry Carmichael, Employment Manager and observed by Tom Barragan, Training Specialist.

ISSUES:

Was the claimant discharged for work related misconduct?

Was the claimant overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a production worker full-time beginning October 20, 2003 through August 25, 2006 when he was discharged.

The claimant was discharged from employment due to a final incident of absenteeism that occurred on August 16, 18, 21 and 22, 2006, when he was a no-call/no-show for work. The claimant admits that he did not call in for work on either August 21 or August 22 because he was too busy taking care of personal matters. The claimant denies missing work on August 16 or August 18, but the employer's records show he did not punch in for work either of those days and he was not paid any wages for those days. The claimant was last warned on June 29, 2006, that he faced termination from employment upon reaching the upper limit of attendance points under the employer's policy. The claimant's absences on August 16, 18, 21 and 22 were due to his need to take care of personal problems. The claimant had been instructed on the employer's attendance policy and knew that missing work would cause him to accumulate attendance points.

The claimant is currently attending school full-time. The wages in his base period were earned from full-time work.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The October 2, 2006, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,488.00.

REMAND: The able and available issue delineated in the findings of fact is remanded for an initial review and determination.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/cs