

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL GALBREATH
Claimant

APPEAL NO. 08A-UI-04167-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARCHER-DANIELS-MIDLAND CO
Employer

**OC: 03-23-08 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
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 April 18, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 13, 2008. The claimant participated in the hearing. Mike Carsons, Plant Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time Operator II for Archer-Daniels-Midland from May 22, 1995 to March 26, 2008. The employer's policy states that the "acceptable level of adjusted absence is no greater than 3% per quarter and all employees will receive their attendance review each quarter" (Employer's Exhibit Two). "The first time an employee exceeds 3% adjusted absence or is late for work three (3) times in a quarter they will be reviewed by the Plant Manager and/or Superintendent and a Union Steward" (Employer's Exhibit Two). "The second time an employee exceeds 3% adjusted absence or is late three (3) times in a quarter within a year they will be reviewed by the Plant Manager and/or Superintendent, a Union Steward and put on probation for one (1) year" (Employer's Exhibit Two). After the second time within a year the employee is referred to EAP (Employer's Exhibit Two). "The third time an employee exceeds 3% adjusted absence or is late three (3) times in a quarter within a year they will be reviewed by the Plant Manager and/or Superintendent, a Union Steward and will receive a "Last Chance" letter with probation for 1 year" (Employer's Exhibit Two). "If the guidelines are exceeded within the probation period the employee will be discharged" (Employer's Exhibit Two). The claimant was placed on probation October 23, 2006, after accumulating 23.2 hours (3.92%) for the second quarter of 2006 and 25.4 hours (3.89%) for the third quarter (Employer's Exhibit Two). On April 10, 2007, the claimant received a Last Chance Letter after accumulating 25.4 hours

(3.89%) for the third quarter of 2007 and 26.9 hours (5.17%) for the first quarter of 2007 (Employer's Exhibit Two). At that time he was told if he exceeded 3.08% absence for the next year to date, his employment would be terminated (Employer's Exhibit Two). On March 10, 2008, the claimant was on vacation. He was off March 11 and 12, 2008, and on vacation March 13, 14, 15, and 16, 2008. He was scheduled to work March 17, and 18, 2008, and was off March 19, and 20, 2008. The claimant drove to Texas and called in March 17, and 18, 2008, and said his back was bothering him. He was still in Texas at the time and his transportation had broken down. On March 5, 2008, the claimant told co-worker Allan Baber he planned to call in March 17 and 18, 2008, to extend his vacation (Employer's Exhibit One). On March 21, 2008, the claimant was suspended pending further investigation regarding his attendance (Employer's Exhibit Two). The employer terminated the claimant's employment March 26, 2008, for excessive absenteeism. He chose not to file a grievance. The claimant believed he could miss two days per quarter but employees are allowed two days per the entire quarter and he had not worked enough hours to earn the two allowed days of time off without exceeding the allowed attendance percentage.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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). The claimant was on a last chance letter when he went on vacation beginning March 10, 2008. He failed to return to work at the end of his scheduled vacation March 17, 2008, and the employer provided credible evidence that as early as March 5, 2008, he planned to call in March 17, and 18, 2008, to extend his vacation by four days because he was off March 19, and 20, 2008. While the

claimant's back may have been bothering him and his transportation may have broken down, the preponderance of the evidence points to a plan not to return to work March 17, and 18, 2008. 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 absenteeism, is considered excessive. Benefits are denied.

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 April 18, 2008, 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 \$2,520.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw