

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VERN R SULLIVAN
Claimant

APPEAL NO. 11A-UI-12923-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC
Employer

OC: 08/28/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

Advance Services, Inc. filed a timely appeal from a representative's decision dated September 27, 2011, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on October 25, 2011. Claimant participated. The employer participated by Ms. Holly Carter, Unemployment Insurance Specialist, and Mr. Jim Stein, Human Resource Department employee. Employer's Exhibits One through Seven were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Vern Sullivan began employment with Advance Services, Inc. on March 14, 2011. The claimant was assigned to work as a heavy assembly worker at the Fimco Company. Claimant generally used Jim Stein as a contact person at Advance Services, Inc.

Mr. Sullivan was separated from employment after he exceeded the permissible number of attendance infractions allowed under Fimco and Advance Services, Inc.'s policies. Under the no-fault attendance policy employees are subject to discharge if they accumulate a specified number of attendance infractions within a rolling calendar period. Mr. Sullivan was aware of the policy and had been warned prior to his discharge.

Mr. Sullivan's last day of work was September 2, 2011. The claimant was off work for a period of time thereafter because of a medical condition.

On September 6, 2011, Jim Stein personally spoke to the claimant about his return to work at the Fimco location. Mr. Sullivan had requested time off to attend a funeral and Mr. Stein had

instructed the claimant to report for work on September 7, 2011 but indicated the claimant could have September 8th off for the funeral. The claimant agreed. Although the claimant confirmed that he had accepted the instruction to return to the Fimco location the following day on September 7, 2011 he did not do so. The claimant did not call in to either Advance Services, Inc. or the Fimco Company to report his impending absence. Based upon the number of attendance infractions prior to the most recent one and the claimant's final failure to report without providing notification, Mr. Sullivan exceeded the permissible number of attendance infractions and was discharged. When informed that he had been discharged for a "no-call/no-show" the claimant did not contest the reason for his dismissal.

It is the claimant's position that he was not instructed to report for work on September 7, 2011 and that it is his belief that he was not released to return at that time.

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 § 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 § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct

that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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 Iowa Supreme Court 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 it must be both excessive and unexcused and that the concept included leaving early, tardiness, etc. The court further held, however, that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer.

In this case the employer has presented a firsthand witness who spoke directly with Mr. Sullivan on September 6, 2011. Mr. Stein testified under oath that he informed the claimant that he was expected to return to the client employer the following day, September 7, 2011 and that Mr. Sullivan agreed to do so. The testimony of Mr. Stein is corroborated by entries in business records that were made in the ordinary course of business employment matters as they occurred. The evidence also established that Mr. Sullivan had received a number of warnings from the company for unsatisfactory attendance and was aware that future attendance violations could result in his termination from employment. The administrative law judge also considers the fact that Mr. Sullivan did not dispute his discharge from employment although he was specifically informed that he was being discharged because of a “no-call/no-show” on September 7, 2011. For these reasons the administrative law judge finds the evidence to be in support of the employer.

There is no contract more basic in employment than the right of an employer to expect employees will appear for work on the hour and day agreed upon. Recurrent failure on that obligation shows a substantial disregard for the employer's interests and standards of behavior that justifies the finding of misconduct in connection with the employment. Claimant was discharged after he exceeded the permissible number of attendance infractions by failing to report for scheduled work on September 7, 2011 and failing to provide notice to the employer of his impending absence. Unemployment insurance benefits are withheld.

Iowa Code § 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 September 27, 2011, reference 02, 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 his weekly benefit amount and meets all other eligibility requirements of Iowa law. 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

pjs/pjs