

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN T MARSHALL
Claimant

APPEAL NO. 09A-UI-16399-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MCDONALD'S
Employer

OC: 09/27/09
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

McDonald's filed an appeal from a representative's decision dated October 21, 2009, reference 01, which held that no disqualification would be imposed regarding Justin Marshall's separation from employment. After due notice was issued, a hearing was held by telephone on December 7, 2009. The employer participated by Charity Houston, Store Manager, and Donna Mann, Owner/Operator. Exhibits One through Six were admitted on the employer's behalf. Mr. Marshall did not respond to the notice of hearing.

ISSUE:

At issue in this matter is whether Mr. Marshall was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Marshall was employed by McDonald's from March 16 until October 3, 2009 as a crew member. He worked approximately 18 hours each week. He was discharged because of his attendance.

Mr. Marshall was off work the two weeks before September 8 at his request. He was told he was to return to work on September 8 and also work on September 9 and 10. He did not call or report for work on either September 8 or September 9. Voice messages were left for him on both dates. He did not report as scheduled on September 10 but did return the employer's calls that day. When the employer spoke to him on September 10, he indicated he did not recall that he was supposed to work. He was suspended for one week and told that he would be discharged if there were any further attendance infractions.

Mr. Marshall was absent without calling in on October 2. He reported to work 30 minutes late on October 3 and was discharged at that time. Attendance was the sole reason for the discharge. He had other absences during the course of his employment but they were all due to illness or other reasonable causes.

Mr. Marshall filed a claim for job insurance benefits effective September 27, 2009. He has received a total of \$480.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Mr. Marshall's absences of September 8, 9, and 10 are unexcused because he failed to properly notify the employer of his intent to be absent. Although he had been off work for two weeks, he had been told verbally that he was scheduled to work all three days. In spite of the verbal warning he received for not coming to work and not calling those three days, he was again absent without calling in on October 2. The evidence of record does not establish any justification for the failure to notify the employer of the four absences referred to above.

The above four unexcused absences occurred during a period of less than one month. The administrative law judge considers this excessive. Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect. As such, it is concluded that disqualifying misconduct has been established and benefits are denied.

Mr. Marshall has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated October 21, 2009, reference 01, is hereby reversed. Mr. Marshall was discharged by McDonald's for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Marshall will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css