

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL BREWER**  
Claimant

**APPEAL NO: 08A-UI-06605-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DOLGENCORP INC**  
Employer

**OC: 06/01/08 R: 04**  
**Claimant: Respondent (2-R)**

Iowa Code § 96.5-2-a - Discharge for Misconduct  
871 IAC 24.32(7) - Excessive Unexcused Absenteeism  
Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Dolgencorp, Inc. (employer), doing business as Dollar General, appealed an unemployment insurance decision dated July 7, 2008, reference 01, which held that Michael Brewer (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 4, 2008. The claimant participated in the hearing. The employer participated through Carol Speidel, Store Manager. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time sales associate from August 24, 2007 through May 23, 2008. His last work date was May 16, 2008 and he called in his absence on May 17, 2008 due to illness. The claimant reported that he had pinkeye and the employer advised him that he needed a doctor's release before he returned to work since pinkeye can be contagious. The claimant did not call the employer until the following Tuesday, May 20, 2008 and stated that he had been released by his doctor. He was advised that he needed a written release. The claimant did not report to work or call the employer on May 21, 22 and 23, 2008. The employer discharged him as on May 23, 2008 when the claimant was a no-call/no-show for three consecutive days. The claimant returned to the work site on May 28, 2008 and brought a medical excuse stating that he was released to return to work after a muscle strain and pain. The claimant provided no medical excuse for pinkeye.

The claimant filed a claim for unemployment insurance benefits effective June 1, 2008 and has received benefits after the separation from employment.

## REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for excessive unexcused absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was off work due to pinkeye but reported that he had been released to return work on May 20, 2008. He was advised he needed a written release and was a no-call/no-show for the

next three consecutive days. Even if the claimant did not have a medical excuse, he could have reported his absences. Two consecutive no-call/no-show absences can constitute job misconduct. Boehm v. IDJS, (Unpublished, Iowa App. 1986). The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded.

**DECISION:**

The unemployment insurance decision dated July 7, 2008, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

---

Susan D. Ackerman  
Administrative Law Judge

---

Decision Dated and Mailed

sda/pjs