

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL C KIRST**  
Claimant

**APPEAL NO: 14A-UI-13491-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SEVENTH AVENUE INC**  
Employer

**OC: 03/30/14**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits  
871 IAC 24.10 – Employer Participation

**STATEMENT OF THE CASE:**

Seventh Avenue, Inc. (employer) appealed a representative's December 22, 2014 (reference 02) decision that concluded Michael C. Kirst (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 27, 2015. A review of the Appeals Bureau's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Grace Cooper appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

**FINDINGS OF FACT:**

The claimant started working for the employer on November 4, 2013. He worked part time (about 30 hours per week) as a packer/puller at the employer's Clinton, Iowa catalog fulfillment center. His last day of work was November 28, 2014. The employer discharged him on that date. The reason asserted for the discharge was excessive tardiness.

The employer's policy provides that if an employee has three tardies in any 30-day period, they will be placed on a three-month probation, and if they then incur three more tardies in any month of that three-month probation, they will be subject to discharge. The claimant had three tardies in the 30 days leading up to August 28, 2014 and was placed on the three-month suspension. He provided no explanation for the three tardies in August. He was then tardy on

November 14 and November 18 with no explanation provided. His supervisor gave him a verbal warning on November 19 that he could not have another tardy before November 28. The claimant was then again tardy on November 24 with no explanation given. As a result of this, the claimant was discharged on November 28.

The claimant established a claim for unemployment insurance benefits effective March 30, 2014. He reactivated the claim by filing an additional claim effective November 30, 2014. A fact-finding interview was held with a Claims Representative on December 17, 2014. The interview was scheduled to be held at 11:10. The employer through Grace Cooper, human resources coordinator, was available to participate at that time. The call, however, was delayed for at least an hour; so Cooper stepped away for another meeting and missed the initial call from the representative. However, she then called the representative back and provided a verbal statement, and thus participated in the fact-finding interview. The claimant has received unemployment insurance benefits after the separation in the amount of \$2,280.00.

### **REASONING AND CONCLUSIONS OF LAW:**

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Tardies are treated as absences for purposes of unemployment insurance law and can constitute misconduct if excessive and unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984); Rule 871 IAC 24.32(7). The presumption is that issues which cause tardiness are generally within an employee's control. *Higgins*, supra. The claimant had excessive tardiness and his final tardy was not excused. The claimant had previously been warned that future tardies could result in termination. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a,-b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

**DECISION:**

The representative's December 22, 2014 (reference 02) decision is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of November 28, 2014. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account is not subject to charge. The claimant is overpaid \$2280 which is subject to recovery.

---

Lynette A. F. Donner  
Administrative Law Judge

---

Decision Dated and Mailed

ld/can