

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH D HEMANN
Claimant

APPEAL NO. 11A-UI-13649-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SKARLIS BROS MOTORS INC
Employer

OC:09/11/11
Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated October 5, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 9, 2011. Claimant participated. Employer participated by Jim Skarlis, the dealer/manager; Don O'Connor, the general manager; and John Moore, the accounting manager. The record consists of the testimony of Jim Skarlis; the testimony of Don O'Connor; and the testimony of Sarah Hemann. John Moore did not testify.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a car dealership located in Mason City, Iowa. The claimant was hired on July 20, 2010. Her original job was sales assistant/internet customer service. On May 1, 2011, she was promoted to finance manager. She retained her job as internet manager. Her last day of work was September 14, 2011. She was terminated on September 15, 2011.

The incident that led to the claimant's termination occurred on September 15, 2011. The claimant was scheduled for work that day and she did not show up for work. The claimant had been late on August 13, 2011, and August 27, 2011. On August 27, 2011, the employer had to send someone to her apartment to find out why she was not at work. She had been sleeping and did not arrive at work until approximately noon. After being late these two times, which were on Saturdays, the claimant was given a zero-tolerance warning for any additional tardiness or absence. The claimant then failed to show up for work on September 15, 2011.

All time off had to be requested thirty days in advance. Any request for time off had to be emailed to Jim Skarlis for approval.

REASONING AND CONCLUSIONS OF LAW:

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(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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such as transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to establish misconduct.

The greater weight of the credible evidence in this case established that the claimant had two instances of tardiness and one instance of absence within approximately one month. The claimant was warned after her second instance of tardiness of August 27, 2011, that no further absences would be allowed. The claimant did not show up for work on September 15, 2011, as scheduled. The claimant testified that she had been given the day off by Don O'Connor. This testimony is not credible. Mr. O'Connor does not approve time off. All time off has to be requested by email to Mr. Skarlis. The claimant also stated that she had her absence noted on Mr. O'Connor's calendar. Mr. O'Connor does not keep such a calendar.

The administrative law judge concludes that two instances of tardiness and one instance of absence within a one month period constitutes excessive unexcused absenteeism. This is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated October 5, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css