

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHARON L KILGORE**  
Claimant

**APPEAL NO. 09A-UI-07466-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**  
Employer

**OC: 04/12/09**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

Casey's Marketing Company filed an appeal from a representative's decision dated May 7, 2009, reference 01, which held that no disqualification would be imposed regarding Sharon Kilgore's separation from employment. After due notice was issued, a hearing was held by telephone on June 10, 2009. Ms. Kilgore participated personally. The employer participated by Jaime Johnson, Manager.

**ISSUE:**

At issue in this matter is whether Ms. Kilgore 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: Ms. Kilgore began working for Casey's on August 10, 2008. She worked approximately 27 hours each week as a cashier. She worked Friday, Saturday, and Sunday of each week. She was absent February 27 and 28 and March 1 due to an upper respiratory infection. She saw the doctor on February 27 and was advised to remain off work until she could talk.

Ms. Kilgore was next scheduled to work at 10:00 p.m. on Friday, March 6. She called her manager approximately one hour before the start of her shift and indicated that she had a doctor's excuse but that it did not indicate the specific dates she was to be off work. She was told to come in anyway and agreed to do so. She did not report for work or re-contact the employer on March 6. Ms. Kilgore was then absent on March 7 and 8 without calling in. She called on March 9 to ask if she still had a job and was told she did not. Continued work would have been available if she had reported to work or had notified the employer of her intentions.

Ms. Kilgore filed a claim for job insurance benefits effective April 12, 2009. She has received a total of \$1, 305.00 in benefits since filing the claim.

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

The administrative law judge concludes that the employer initiated Ms. Kilgore's separation when she was not allowed to return to work on March 9. Therefore, the separation was a discharge. 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 she 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.

Ms. Kilgore was absent on March 6, 7, and 8 without notice to the employer. She agreed to come in on March 6 in spite of the fact that her doctor's excuse may not have met the employer's requirements. She did not come in as agreed and did not contact the employer to report a change in her plans. Therefore, the absence is unexcused. The absences of March 7 and 8 are unexcused because there was no effort to report the intent to be absent. Ms. Kilgore knew she was required to report her absences. She knew or should have known, without benefit of prior warnings, that missing three consecutive shifts without calling was contrary to the employer's expectations. Three consecutive unexcused absences are sufficient to establish excessive unexcused absenteeism, which is a substantial disregard of the standards an employer has the right to expect. For the above reasons, benefits are denied.

Ms. Kilgore has received benefits since filing her claim. 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 May 7, 2009, reference 01, is hereby reversed. Ms. Kilgore was discharged by Casey's for misconduct in connection with her employment. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. Kilgore will be required to repay benefits.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/pjs