

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY A MABEUS
Claimant

APPEAL NO. 10A-UI-13630-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

AREA WIDE FOOT & ANKLE CENTER PC
Employer

OC: 08/15/10
Claimant: Respondent (2R)

Section 96.5-2-a – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 22, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 22, 2010, in Davenport, Iowa. Employer participated by Jeannine Licandro, office manager and nurse, and James Licandro, D.P.M. Claimant failed to respond to the hearing notice and did not appear for the hearing. The record consists of the testimony of Jeannine Licandro; the testimony of James Licandro; and Employer's Exhibits 1-15.

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 podiatry practice. The claimant was hired on November 30, 2009. Her last day of work was August 19, 2010. She was terminated on August 19, 2010.

The incident that led to the claimant's termination occurred on August 16, 2010. The employer had a written attendance policy that assessed points for tardiness; leaving early; and missing work. Termination could result after 8 points. As of August 16, 2010, the claimant was at 11 points. On August 16, 2010, the claimant had agreed to work late. Her normal time to leave was 5:00 p.m. or later if patients were still in the office. At 2:00 p.m., the claimant informed the employer that she had to leave for personal reasons related to child care.

The claimant's attendance record is as follows:

August 16, 2010	Left Early
July 22, 2010	Sick
July 9, 2010	Late
July 6, 2010	Late
June 8, 2010	No Call/No Show
June 7, 2010	Late (flat tire)
May 25, 2010	Late
May 24, 2010	Late
May 13, 2010	Late
May 11, 2010	Late (flat tire)
May 10, 2010	Late
May 6, 2010	Late

The claimant was aware of the employer's written attendance policy. She was counseled on numerous occasions concerning her attendance. She told the employer that she had trouble getting up in the morning because she was so tired.

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.

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, e.g., transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 1192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The evidence established excessive unexcused absenteeism. The claimant's attendance records show repeated absences due to tardiness. The employer provided testimony that the claimant said she had difficulty getting up in the morning because she was tired. Only one absence was due to illness. The claimant had transportation problems, Her final absence was due to child care problems, a matter of personal responsibility. The employer had a written policy concerning attendance and the claimant was aware of that policy. She had counseling sessions, which included discussions of her repeated tardiness. Since the evidence shows excessive unexcused absenteeism, the claimant was discharged for 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 September 22, 2010, 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/pjs