

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTY L BROTHERTON
Claimant

APPEAL NO. 07A-UI-03690-S2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

RETAIL GROCERY INVENTORY SERVICE
Employer

**OC: 11/26/06 R: 04
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Retail Grocery Inventory Service (employer) appealed a representative's March 29, 2007 decision (reference 01) that concluded Christy Brotherton (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 25, 2007. The claimant did not provide a telephone number where she could be reached and, therefore, did not participate. The employer participated by Heather Ruddy, District Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on January 20, 1999, as a part-time auditor. The claimant signed for receipt of the company handbook on January 20, 1999, and again on March 25, 2004. The handbook informs employees to report all absences to the office prior to the start of the shift. In the year 2006, the employer issued the claimant approximately nine warnings for attendance. In the year 2007 the employer issued the claimant two warnings for attendance. The employer warned the claimant that further infractions could result in her termination from employment.

On February 5, 2007, the claimant notified the employer she could not work because she did not have transportation to work. The employer agreed to pick her up. When the employer went to the claimant's residence to give her a ride to work, the claimant was not there. On February 20, 2007, the claimant did not have a ride to work. The employer gave the claimant transportation. Due to the claimant's late notice to the employer, the claimant was tardy in arriving at work. On March 8, 2007, the claimant did not appear for work or notify the employer of her absence. The employer telephoned the claimant and told the claimant that she had to properly notify the office of any absence. On March 11, 2007, the claimant appeared for work but the employer terminated her for attendance and reporting issues.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 275 N.W.2d 187 (Iowa 1984). Three incidents of tardiness or absenteeism after a warning constitutes misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). An employer has a right to expect employees to appear for work when scheduled or notify the employer of any absences. The claimant disregarded the employer's right by repeatedly failing to appear for work or report her absences. The claimant's disregard of the employer's interests is misconduct. As such, she is not eligible to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received benefits since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's March 29, 2007 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,070.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw/kjw