

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONNA D ROGERS
Claimant

APPEAL NO. 11A-UI-09471-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OZARK AUTOMOTIVE DISTRIBUTORS INC
Employer

**OC: 06/12/11
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Ozark Automotive Distributors, Inc. (Ozark), filed an appeal from a decision dated July 13, 2011, reference 01. The decision allowed benefits to the claimant, Donna Rogers. After due notice was issued, a hearing was held by telephone conference call on August 9, 2011. The claimant did not provide a telephone number where she could be contacted and did not participate. The employer participated by Human Resources Supervisor Whitney Smith-McIntosh. Exhibit One was admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Donna Rogers was employed by Ozark from September 9, 2002 until July 6, 2011 as a full-time material handler. The last day on which she performed her regular job duties for the employer was May 24, 2011. She called in absent due to illness on May 31, June 1, and June 2, 2011. After that, she did not call or come to work.

On June 7, 2011, Human Resources Supervisor Whitney Smith-McIntosh sent the claimant a letter that discussed the possibility she might qualify for FML. She enclosed the necessary paperwork along with a return envelop and stated the documents must be completed and returned within 15 days. When Ms. Rogers received the letter on June 9, 2011, she called Ms. Smith-McIntosh and asked for the paperwork again. The employer gave the paperwork to Joel, Ms. Rogers' spouse, who also worked at Ozark, and told the claimant she was doing so.

There was no further contact from the claimant and the FML paperwork was not returned. On June 22, 2011, the employer sent another letter to Ms. Rogers notifying her that no FML paperwork had been received. It further notified her that failure to contact the employer or provide the paperwork by July 6, 2011, would result in the leave of absence being denied and Ms. Rogers would be subject to the attendance policy. There was no further contact of any kind by July 6, 2011, and the claimant was discharged for absenteeism.

The claimant's spouse did not communicate on her behalf with the employer to keep it apprised of her status. It is also noted Ms. Rogers would drop off and pick up her husband at the facility every work day and made no effort to come into the office and discuss her situation. Ms. Smith-McIntosh was customarily in front of the building every day at 4:00 p.m. "seeing the employees off" and Ms. Rogers never spoke to her on any of those occasions.

Donna Rogers has received unemployment benefits since filing a claim with an effective date of June 12, 20011.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant was discharged for excessive, unexcused absenteeism. The employer gave her every opportunity to request a leave of absence, to discuss the situation, provide the FML paperwork or to apply for some other type of leave. The claimant had ample notice of what was expected of her and that her job was in jeopardy if she did not communicate with the employer.

Ms. Rogers' failure to contact the employer at any time resulted in her absences being unexcused. The absences, which may or may not have been due to illness, were not properly reported and therefore cannot be excused. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Under the provisions of the above Administrative Code section, excessive, unexcused absenteeism is misconduct for which the claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of July 13, 2011, reference 01, is reversed. Donna Rogers is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw