

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENT J LAUTENSCHLAGER
Claimant

APPEAL NO. 08A-UI-00276-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 12/16/07 R: 01
Claimant: Respondent (2)

Section 96.5(2)a – Discharge for Misconduct
Section 96.6(2) – Timeliness of Protests
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Mercy Hospital filed an appeal from a representative's decision dated January 8, 2008, reference 02, which held that the protest to Brent Lautenschlager's claim was not filed timely. After due notice was issued, a hearing was held by telephone on January 24, 2008. Mr. Lautenschlager participated personally. The employer participated by Eddie Brown, Employee Relations/Compliance Coordinator, and Monica Reed-Tremmel, General Diagnostic Manager for Medical Imaging. Exhibits One, Two, and Three were admitted on the employer's behalf.

ISSUE:

The first issue in this matter is whether the employer filed a timely protest to Mr. Lautenschlager's claim. If the protest is found to be timely, the issue then becomes whether he was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Lautenschlager filed a claim for job insurance benefits effective December 16, 2007. Notice of the claim was mailed to the employer at its address of record on December 18. The employer did not receive the notice until January 3, 2008. A protest was filed by fax the same day.

Mr. Lautenschlager was employed by Mercy Hospital from January 2, 2004 until December 11, 2007 as a full-time radiology technician. He was discharged because of his attendance. Mr. Lautenschlager usually worked what is considered a weekend package, which required him to work Friday, Saturday, and Sunday. He was paid a premium for working the weekends. In September of 2007, the employer discontinued paying him the premium because of his attendance history. He had been late on seven occasions and absent on six occasions during 2007.

The employer makes available a "commuter package" whereby out-of-town employees can stay at the nearby Holiday Inn at a discounted rate paid for by the employer. The package is made available so that out-of-town employees can be assured of getting to work. Mr. Lautenschlager, who lives in Humboldt, checked into the Holiday Inn on November 29 with the intention of reporting to work on November 30. However, he did not report for work because his paycheck was short due to a deduction for a prior overpayment of wages. Mr. Lautenschlager called the employer the morning of November 30 to report that he would be absent the entire weekend because he did not have enough money to commute from Humboldt.

The employer learned on or about December 4 that Mr. Lautenschlager stayed in Des Moines the night of November 29. It was concluded that he gave false information as to why he was not at work on November 30. He was next scheduled to work on December 7. When he had not reported to work as scheduled, his supervisor contacted him and was advised that he would not be at work because he had no money to get to work. He did not indicate he would be absent the following two days. Because he did not report for work or contact the employer on December 8 and 9, the decision was made to discharge Mr. Lautenschlager.

Mr. Lautenschlager filed a claim for job insurance benefits effective December 16, 2007. He has received a total of \$1,735.00 in benefits since filing his claim.

REASONING AND CONCLUSIONS OF LAW:

For reasons that follow, the administrative law judge concludes that the employer filed a timely protest to Mr. Lautenschlager's claim. The protest was due on December 28, 2007. However, the employer did not receive the notice of claim until after the due date. The notice was mailed during the Christmas holiday season, when the postal service usually handles a higher volume of mail. It is not inconceivable that mail would be delayed during this time, even mailed directed within the city. The employer acted with due diligence in filing its protest by fax the same day it received the notice of claim. Since the employer did not receive the notice of claim in time to respond by the due date, it is concluded that the protest filed on January 3, 2008 should be deemed timely filed as required by Iowa Code section 96.6(2). As such, the administrative law judge has jurisdiction over the separation issue.

Mr. Lautenschlager was discharged by Mercy Hospital. 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). Mr. Lautenschlager was discharged because of his attendance. He was on notice that his attendance was unacceptable in that he lost premium weekend pay in September of 2007 as a result of his attendance history. Although the loss of wages may not have constituted formal disciplinary action, it should have been sufficient to put Mr. Lautenschlager on notice that continued attendance infractions could lead to a more severe penalty, including discharge.

An individual who was discharged because of attendance is disqualified from receiving benefits if he was excessively absent on an unexcused basis. Properly reported absences that are for reasonable cause are considered excused absences. Mr. Lautenschlager accumulated six absences after he was on notice of his unacceptable attendance. He was absent on November 30 in spite of the fact that he was in town and could have come to work. Although his wages were short, he was already in town and would not have incurred any expense in reporting for work. He had to drive back to Humboldt anyway, so it should not have mattered whether he drove home after his shift rather than before. It appears to the administrative law judge that Mr. Lautenschlager did not report for work on November 30 because he was upset

that his pay was reduced to recover the previous overpayment of wages. Because the absence was not for reasonable cause, it is unexcused.

The administrative law judge cannot conclude that Mr. Lautenschlager gave false information regarding November 30. His statement was that he was not coming to work that weekend because he did not have money to drive to Des Moines. There was nothing said that would indicate he claimed to be calling from Humboldt rather than Des Moines. He may well have been referring to having to drive to Des Moines the remaining two days of his weekend shift. For the above reasons, the allegation of dishonesty has not been established.

Mr. Lautenschlager's absences of December 1 and 2 are unexcused, as they were not for reasonable cause. He was absent because he did not have enough money to drive to and from Des Moines due to the fact that the employer withheld a portion of his pay. The pay was not reduced for any improper reason, only to recover wages previously paid in error. It was Mr. Lautenschlager's responsibility to transport himself to and from work. The fact that he could not afford gas was not reasonable grounds for missing work. Therefore, the absences of December 1 and 2 are unexcused. The absences of December 7, 8, and 9 are also unexcused. All three were due to the fact that he did not have money for gas. None of the three were reported prior to the start of the shift. The employer spoke with Mr. Lautenschlager on December 7, but he made no effort to call on either December 8 or 9.

Mr. Lautenschlager was absent from two consecutive weekend packages for a total of six days. As previously stated herein, all six absences are unexcused, as they were not for reasonable cause. The administrative law judge considers six consecutive unexcused absences to be excessive. Given that Mr. Lautenschlager was on notice of his unacceptable attendance, it is concluded the misconduct has been established. Accordingly, benefits are denied. He has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated January 8, 2008, reference 02, is hereby reversed. The employer filed a timely protest to Mr. Lautenschlager's claim. He was discharged for misconduct in connection with his employment. Benefits are withheld until such time as Mr. Lautenschlager has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Lautenschlager has been overpaid \$1,735.00 in job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw