

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALBA ROSALES PEREZ**

Claimant

**APPEAL NO. 11A-UI-06280-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**

Employer

**OC: 04/03/11**

**Claimant: Respondent (2/R)**

Iowa Code § 96.5-2-a - Discharge for Misconduct  
871 IAC 24.32(7) - Excessive Unexcused Absenteeism  
Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

West Liberty Foods, LLC (employer) appealed an unemployment insurance decision dated May 5, 2011, reference 01, which held that Alba Rosales Perez (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 8, 2011. The claimant participated in the hearing. Ike Rocha interpreted on behalf of the claimant. The employer participated through Nikki Bruno, human resources generalist and Maria Bozaan, human resources manager. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected 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 employed as a full-time production worker from October 15, 2009 through April 7, 2011, when she was discharged for violation of the attendance policy. The employer's attendance policy provides that employees can be terminated once they accumulate ten attendance points; however, an employee will not be terminated unless they are given an L3 Attendance Notification.

The claimant was off work for 12 weeks due to a non-work-related medical condition under the Family Medical Leave Act. She was released to return to work without restrictions on March 14, 2011 and when she returned to work on that date, she had six attendance points. The claimant took a personal day on March 15, 2011 and worked on March 16, 2011. She left her shift early on March 17, 2011, which was her last day of employment.

The employer testified that if an employee misses seven consecutive days of work which is excused by a physician, then only one point is assessed. However, a point is assessed each day after that until the employee returns to work.

The claimant had 21.5 attendance points at the time of her separation. She incurred one point each on March 31, 2011 and April 1, 2011. The claimant was a no-call/no-show on April 4, 2011 and April 5, 2011, which resulted in six attendance points. She properly called in her absence on April 6, 2011 due to illness. Human Resources Generalist Nikki Bruno called the claimant on April 6, 2011 and the claimant later returned her call. Ms. Bruno and interpreter Karina Garcia spoke with the claimant. Ms. Bruno gave the claimant a verbal L3 Attendance Notification and told her that if she missed work on the following day, she would be terminated. The claimant was scheduled for work on April 7, 2011, but she failed to report to work and failed to call the employer. She was discharged as a result.

The claimant filed a claim for unemployment insurance benefits effective April 3, 2011 and has received benefits after the separation from employment.

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

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits

disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on April 7, 2011 for excessive unexcused absenteeism.

Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). However, excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct, since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Although the claimant's absences were due to illness, she did not properly report three absences in her final week of employment. She was a no-call/no-show on April 4, 5, and 7, 2011. Consequently, the employer has met its burden and work-connected misconduct as defined by the unemployment insurance law has been established in this case. Benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

#### **DECISION:**

The unemployment insurance decision dated May 5, 2011, 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 been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw