

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN R WILVER
Claimant

APPEAL NO. 08A-UI-07338-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS
Employer

OC: 07/06/08 R: 04
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

West Liberty Foods filed an appeal from a representative's decision dated August 6, 2008, reference 02, which held that no disqualification would be imposed regarding John Wilver's separation from employment. After due notice was issued, a hearing was held by telephone on August 27, 2008. Mr. Wilver participated personally and offered additional testimony from Miriam Burdette. The employer participated by Jean Spiesz, Human Resources Manager. Exhibit One was admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Wilver 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. Wilver was employed by West Liberty Foods from June 25, 2007 until July 1, 2008. He was employed full time in production. He was discharged because of his attendance. The employer tracks attendance on a point system and an individual is subject to discharge when he reaches 10 points.

Mr. Wilver called and reported that he would be absent for personal reasons on August 26, October 8, October 19, October 30, December 11, and December 12, 2007. He was absent due to illness on September 20, and October 5, 2007, and March 24, and May 17, 2008. He was late reporting to work on October 22 and October 29, 2007, and April 9, 2008. Mr. Wilver reached 9.5 points on March 27, 2008, but was not given the required notice alerting him to this status. He was at 12 points when the employer warned him about his attendance on May 20, 2008. Although he had more than ten points, he was not discharged because he had not been given prior notice of his points.

The decision to discharge Mr. Wilver was based on his absence of June 30. He asked supervisors during the week ending June 28 if he could take June 30 off. One supervisor told him he might be able to take the day off if he worked on Saturday, June 28. On June 27, he was told he could not have June 30 off. Mr. Wilver called in absent on June 30. He was absent because he accompanied his girlfriend to Iowa City to have an out-patient treatment. He was discharged when he reported to work on July 1. Attendance was the sole reason for the separation.

Mr. Wilver filed a claim for job insurance benefits effective July 6, 2008. He has received a total of \$2,166.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

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). 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. The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Mr. Wilver accumulated seven absences that were due to personal reasons. Absences caused by matters of purely personal responsibility are not excused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The final absence that prompted the discharge, June 30, was for personal reasons, as Mr. Wilver wanted to be with his girlfriend while she had out-patient surgery. Moreover, he took the day off in spite of being told that his request to have it off was denied. Although Mr. Wilver may have been told earlier in the week that he might be able to take June 30 off, he knew as of June 27 that his request was being denied. In spite of knowing the request was denied and in spite of knowing that he was in danger of losing his job, Mr. Wilver went ahead and took June 30 off.

Mr. Wilver's seven unexcused absences occurred during a period of approximately ten months. The administrative law judge considers this excessive. Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect. For the reasons cited herein, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

Mr. Wilver has received job insurance benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. Iowa Code section 96.3(7). The law generally requires that any overpayment of benefits be repaid. However, where an overpayment results from the reversal of a decision allowing benefits on a separation issue, the overpayment may be waived if the claimant did not make fraudulent statements during the fact-finding interview that resulted in an award of benefits and the employer did not participate in the fact-finding interview. This matter will be remanded to Claims to determine if Mr. Wilver will be required to repay benefits.

DECISION:

The representative's decision dated August 6, 2008, reference 02, is hereby reversed. Mr. Wilver was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he 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. This matter is remanded to Claims to determine if Mr. Wilver will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw