

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHNNA R SHAW
Claimant

APPEAL NO. 11A-UI-11057-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S GENERAL STORES
Employer

**OC: 07/17/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Casey's General Stores filed a timely appeal from an unemployment insurance decision dated August 12, 2011, reference 01, that allowed benefits to Johnna R. Shaw. After due notice was issued, a telephone hearing was held September 14, 2011, with Ms. Shaw participating. Store Manager Pat Lettington participated for the employer. The administrative law judge takes official notice of Agency benefit payment records.

ISSUE:

Was the claimant discharged for misconduct in connection with the employment?

FINDINGS OF FACT:

Johnna R. Shaw was employed by Casey's General Stores from February 13, 2009, until she was discharged July 21, 2011. She last worked full-time as a cashier. Ms. Shaw was tardy for her 8:00 a.m. shift on July 21, 2011. She had overslept. She had been tardy under similar circumstances on July 9, 2011. She left work early for medical reasons on both May 23 and May 24, 2011. She had been tardy on May 17, 2011. She called the employer and said she was running late. She did not, at that time, give a reason for running late. However, she left work early that day because she was not feeling well. Ms. Shaw had received verbal and written warnings about her attendance. She has received unemployment insurance benefits since filing a claim effective July 17, 2011.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with her employment. It does.

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.

Excessive unexcused absenteeism, a concept that includes tardiness, is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) and 871 IAC 24.32(7).

The parties agree that the final two instances involved tardiness for which Ms. Shaw did not notify the employer. She greater weight of evidence establishes that the prior three absences were due to medical conditions and that the claimant had notified the employer of the reason for the absences. While these three incidents do not constitute unexcused absences, the evidence still establishes that the claimant was tardy on two occasions within two weeks and had received a warning after the July 9 incident. The administrative law judge concludes that the evidence is sufficient to establish excessive unexcused absenteeism. Benefits are withheld.

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 question of whether the claimant has received benefits that she must repay is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated August 12, 2011, reference 01, is reversed. Benefits are withheld until the claimant 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 question of repayment of benefits is remanded.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw