

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NORENE E NEVINS

Claimant

APPEAL NO. 10A-UI-05087-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM JANITORIAL SERVICES

NORTH CENTRAL INC

Employer

OC: 02/28/10

Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

ABM Janitorial Services North Central, Inc. (ABM) filed an appeal from a representative's decision dated March 23, 2010, reference 01, which held that no disqualification would be imposed regarding Norene Nevins' separation from employment. After due notice was issued, a hearing was held by telephone on May 17, 2010. Ms. Nevins participated personally. The employer participated by Artie Smith and Shonda Smith, Area Supervisors, and was represented by Denise Norman of Employers Edge. Exhibits One through Seven were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Nevins was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Nevins was employed by ABM from April 29, 2009 until February 25, 2010. She worked approximately 30 hours each week as a janitor. She was discharged for repeatedly failing to give the required four hour's notice of intended absences.

Ms. Nevins received a verbal warning on December 17, 2009 regarding her failure to give the required notice. She was advised that further disregard of the policy would result in further disciplinary action, including possible termination. She received her first written warning on February 11 after she failed to give four hour's notice of being absent on February 9. She was again warned that a failure to heed the policy could result in termination. Ms. Nevins received a second written warning on February 18. She had failed to give timely notice of absences on February 16 and 17.

On February 19, Ms. Nevins called her supervisor approximately one hour before the start of her shift to see if she had to come to work. She was told she had to come to work but responded that it was snowing "too bad." She did not report for work as scheduled. On

February 22, she was suspended pending a further determination regarding her continued employment with ABM. She was notified of her discharge on February 25, 2010.

Ms. Nevins filed a claim for job insurance benefits effective February 28, 2010. She has received a total of \$1,232.00 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 benefits if she was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

The primary reason for Ms. Nevins' discharge was her failure to give the employer four hour's notice when she was going to be absent. She usually gave from 30 to 45 minute's notice and her shift began at 5:00 p.m. She was amply warned that her failure to give four hour's notice was jeopardizing her continued employment with ABM. In spite of the warnings, she did not conform her conduct to the employer's standards. By not giving the required notice, she hampered the employer's ability to redistribute the work she would have performed. The administrative law judge concludes that Ms. Nevins' failure to conform her conduct after several warnings constituted a substantial disregard of the standards she knew the employer expected of her and is, therefore, misconduct within the meaning of the law. As such, benefits are denied.

Ms. Nevins has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated March 23, 2010, reference 01, is hereby reversed. Ms. Nevins was discharged by ABM for misconduct in connection with her employment. Benefits are denied until she has worked in and been paid wages for insured work equal to ten

times her weekly job insurance benefit amount, provided she is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. Nevins will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css