

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA M REID
Claimant

APPEAL NO: 08A-UI-08193-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEATON CORPORATION
STAFF MANAGEMENT
Employer

OC: 09/16/07 R: 03
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Seaton Corporation / Staff Management (employer) appealed a representative's September 3, 2008 decision (reference 04) that concluded Lisa M. Reid (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 29, 2008. The claimant participated in the hearing. Rachel Leist appeared on the employer's behalf and presented testimony from one other witness, Carrie Herrera. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on January 29, 2008. She worked full time as a production worker providing contract labor at an Iowa City, Iowa, manufacturing facility. Her normal work schedule was from 2:00 p.m. to 10:00 p.m., Monday through Friday, although she would be considered tardy if she clocked in later than 1:54 p.m. Her last day of work was July 8, 2008. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

On June 24 the employer had given the claimant a final written warning advising her that if she missed any additional time in the next 90 days, she would be discharged. The employer's attendance policy normally provides for a final warning such as this when the employee reaches 3.5 of unexcused absence points; in the claimant's case, in the 90-day period preceding the June 24 warning, she had been charged with points:

Date	Occurrence/reason if any	Points Assessed
04/25/08	Absence, likely no transportation.	1 point assessed.
05/02/08	Absence, sick.	1 point assessed (cum. 2 points).
05/15/08	Left early, sick.	.5 point assessed (cum. 2.5 points).
05/21/08	Absence, consulting with lawyer.	1 point assessed (cum. 3.5 points).
05/22/08	Absence, sick.	1 point assessed (cum. 4.5 points).
05/23/08	Absence, going to doctor/hospital.	1 point assessed (cum. 5.5 points).
05/27/08	Absence, sick.	1 point assessed (cum. 6.5 points).
06/02/08	Absent, 14-year-old child sick.	1 point assessed (cum. 7.5 points).
06/04/08	Absent, no transportation.	1 point assessed (cum. 8.5 points).
06/06/08	Absent, likely no transportation.	1 point assessed (cum. 9.5 points).
06/09/08	Absent, had bruises.	1 point assessed (cum. 10.5 points).
06/10/08	Late clocking in (two minutes).	.5 point assessed (cum. 11.0 points).
06/12/08	Absent, waiting for inhaler for child.	1 point assessed (cum. 12.0 points).
06/23/08	Left early, reason not specified.	.5 point assessed (cum. 12.5 points).

During this period, the claimant had other absences, some of which were due to health reasons for which she provided a medical excuse and others which were due to a violent domestic situation that the employer excused and did not assess points.

While there were weeks in which the claimant's line did not work every day, the production and work schedule for the next week would be put in with the employees' pay checks on the prior Friday. On the schedule distributed to the claimant with her pay check on June 27 for the work week beginning June 30, she and her line were scheduled to work each day, that Monday through Thursday, July 3. However, the claimant was a no-call, no-show for the scheduled work on July 3, for which the employer assessed two points.

The employer did not work on Friday, July 4. The claimant was not scheduled to work on Monday, July 7. On Tuesday, July 8, the second shift account manager, Ms. Herrera, saw the claimant as she was clocking in and initially believed the claimant was late. Because of that belief plus knowing the claimant had been a no-call, no-show on July 3, she told the claimant to clock out and go home, which the claimant did. She later spoke again to Ms. Herrera and was told she was discharged for her attendance, specifically the additional occurrences after June 24 when the claimant was told she would be discharged if she had further occurrences within the next 90 days. Ms. Herrera subsequently discovered that the claimant had in fact not been tardy on July 8; however, in making the termination decision, she had also relied on the July 3 no-call, no-show, which alone was a further incident after June 24 that would alone have lead to discharge.

The claimant established a claim for unemployment insurance benefits effective September 16, 2007. She reopened that claim with an additional claim filed effective August 10, 2008. Upon the expiration of her prior claim year, she established a second claim year effective September 14, 2008. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$920.00 in the prior claim year and \$84.00 in the current claim year.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). The claimant's final absence was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's September 3, 2008 decision (reference 04) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 8, 2008. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw