

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN W RUBEY
Claimant

APPEAL NO. 07A-UI-01031-NT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

IBP FOODS INC
Employer

**OC: 12-24-06 R: 01
Claimant: Respondent (2)**

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated January 18, 2007, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 21, 2007. The claimant participated. Participating for the employer was Mr. Hal Edrington, Human Resources Manager.

ISSUES:

The issues in this matter are whether the claimant quit for good cause attributable to the employer, whether the claimant was discharged for misconduct in connection with his work and whether the claimant is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that the claimant worked for Tyson Foods from January 27, 2003 until January 4, 2006 when he was discharged by the employer for excessive unexcused absenteeism. Mr. Rubey was a full-time production worker and paid by the hour.

Mr. Rubey had been warned by the company that his attendance was unsatisfactory and his absences were considered to be excessive. On December 30, 2005, the claimant called in indicating that he would not be reporting for scheduled work because of "personal business." The claimant did not again report for work as he believed he had been discharged because he had been previously warned that his absences were excessive. Mr. Rubey reported back on January 4, 2006 to pick up his most recent paycheck and at that time indicated that his plan was to continue working at another part-time job and anticipated that it might turn into full-time work at a later date.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged from employment under disqualifying conditions.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are volitional. See Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Absences related to personal matters are generally held to be unexcused as they are considered to be matters of personal responsibility in the absence of a showing of emergency or compelling reason.

In this case, the evidence establishes that Mr. Rubey was aware that his absences were considered to be excessive by his employer and the claimant had been warned. The claimant, nonetheless chose not to report to work on December 30, 2005 because of "personal business" related to his oldest son. There is no evidence in the record to establish that this absence was of a compelling or emergency nature. Although given the opportunity, Mr. Rubey chose not to disclose the factual basis for his decision not to report for scheduled work. Therefore, the administrative law judge must conclude that although properly reported, it was not excused by the employer based upon the reason given to the employer and at the time of hearing. As the claimant had a number of other unexcused absences and was on a final warning for attendance, it must be held that the claimant was discharged under disqualifying reasons and benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's January 18, 2007, reference 01, decision is reversed. The claimant 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 benefit amount, provided he satisfies all other conditions of eligibility. The claimant is overpaid unemployment insurance benefits in the amount of \$2,061.00.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs/kjw