

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA J DECKER
Claimant

APPEAL NO. 09A-UI-10593-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

M & T INVESTMENTS INC
Employer

**Original Claim: 05/31/09
Claimant: Respondent (2-R)**

Section 96.5-2- a Discharge for Misconduct
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

M & T Investments, Inc. filed a timely appeal from a fact-finder's decision dated July 20, 2009, reference 02, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on August 10, 2009. Although duly notified, the claimant did not respond to the hearing notice and did not participate. The employer participated by John Danneman, company owner, and Diana Loes.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: The claimant was employed as an assistant manager for M & T Investments, Inc., doing business as Happy Joe's Pizza, for approximately six months before being discharged on February 20, 2009, for repeated absenteeism and tardiness. Ms. Decker was employed on a full-time basis and was paid by the hour. Her immediate supervisor was John Danneman, company owner.

Ms. Decker was discharged on February 20, 2009, based upon her failure to report for scheduled work on the preceding day, February 19, 2009. The claimant called in that day and indicated that she would not be reporting to work because she did not have a babysitter. Ms. Decker has previously been warned for her failure to report for scheduled work for similar reasons, including a lack of babysitter and a lack of transportation. The claimant had also failed to report for scheduled work in a timely manner on numerous occasions and had been warned.

Based upon the repetitive nature of the claimant's failure to report for work and her repetitive absenteeism, for reasons that the employer considered to be within the claimant's control, a decision was made to terminate Ms. Decker from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the evidence in the record is sufficient to warrant a denial of unemployment insurance benefits.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which 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. On the other hand 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.

The evidence in the record establishes that Ms. Decker had been warned by the employer for her failure to report for scheduled work and for her repeated tardiness. The claimant's failure to report for scheduled work caused staffing problems for the employer, and the claimant was aware that her employment was in jeopardy. A decision was made to terminate the claimant when she once again called in and indicated she would not be reporting for scheduled work due to a lack of a babysitter.

The Supreme Court of Iowa held in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) that excessive unexcused absenteeism is one form of misconduct. The court held that the absenteeism must be excessive and unexcused and that the concept includes tardiness, leaving early, etc. In the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) the Supreme Court of Iowa held that absence due to matter of "personal responsibility," e.g. transportation problems and oversleeping, are considered unexcused.

There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's discharge was disqualifying. 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 issue of whether the claimant must repay the unemployment insurance benefits she has received is remanded to the Unemployment Insurance Services Division for determination.

DECISION:

The representative's decision dated July 20, 2009, reference 02, is reversed. Angela Decker is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits she has received is remanded to the Unemployment Insurance Services Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw