

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FLOYD EASLEY
Claimant

APPEAL NO: 08A-UI-05787-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

OMFC SERVICE COMPANY
Employer

OC: 05-18-08 R: 02
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 12, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 22, 2008. The claimant participated in the hearing. Cindy Plantz, Human Resources Manager and Terry Stritling, Business Unit Manager, participated in the hearing on behalf of the employer. Claimant's Exhibits A and B were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time hamba operator for OMFC Service Company from January 14, 2002 to May 10, 2008. He was discharged from employment due to a final incident of absenteeism that occurred May 10, 2008. The employer uses a no-fault attendance policy and employees are terminated upon reaching 11 points during a rolling calendar year. After five points they receive a counseling session; after seven points they receive a corrective interview; after nine points they receive a written warning; after 10 points they receive four days of reflection off work and their employment is terminated upon reaching 11 points. On October 8, 2007, the claimant took a day of vacation but only had 7.5 hours so he received one-half point; on October 23, 2007, he was ill and received one point; on January 12, 13, 21, 22, 27, February 4, 5, 6 and 7, 2008, he used unplanned PTO or had an unexcused absence and received one point for each. On May 10, 2008, he was 45 minutes late for work because he overslept and received one-half point for a total of 11 points and his employment was terminated. The claimant received written warnings June 18 and October 25, 2007, and January 29, 2008; and four days of reflection February 6, 2008. He testified he was absent with a doctor's note February 4 through 7, 2008, and those points should not have counted although

he did not apply for FMLA as he had done in the past and did not dispute those points at the time they were received.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). While the claimant argues that his absences February 4 through 7, 2008, should not have counted because he was ill, the employer has a no-fault attendance policy and the claimant did not apply for FMLA or dispute his points for those absences at the time they were issued. After those absences he had 10 and one-half points and consequently his tardiness May 10, 2008, put him at 11 points and his employment was terminated. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are withheld.

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 June 12, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. 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 is otherwise eligible. The claimant is overpaid benefits in the amount of \$3,123.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs