

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT BASSETT
Claimant

APPEAL NO: 11A-UI-05493-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 03-13-11
Claimant: Respondent (2R)

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 April 12, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 18, 2011. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Elizabeth Gregan, Assistant General Manager and Robert Berge, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Nine 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 part-time cook for Buffalo Wild Wings from May 20, 2010 to March 5, 2011. He was discharged from employment due to a final incident of absenteeism that occurred March 5, 2011. The claimant was absent October 9, 2010, due to personal reasons and called in to report his absence. He was scheduled to work a double shift October 10, 2010, and was a no-call/no-show for both shifts. He was absent January 12, 2011, and the employer was unable to reach him when he did not call or show up for work but determined he probably misread the schedule. The claimant was 23 minutes tardy February 23, 2011; nine minutes tardy February 24, 2011; eight minutes tardy February 25, 2011; six minutes tardy March 4, 2011; and 38 minutes tardy March 5, 2011, after he overslept and failed to call in to report he would be late. The claimant received a final written warning for attendance October 13, 2010, for absences and no-call/no-shows October 9 and 10, 2010 (Employer's Exhibit Six). He received a final written warning January 13, 2011, for a no-call/no-show January 12, 2011 (Employer's Exhibit Seven). On February 24, 2011, Assistant General Manager Elizabeth Gregan met with the claimant to discuss attendance and tardiness issues (Employer's Exhibit Eight). She told him that if he had another incident of tardiness his employment would

be terminated (Employer's Exhibit Eight). The claimant signed the documented conversation (Employer's Exhibit Eight). The employer terminated the claimant's employment March 5, 2011, following his last incident of tardiness of 38 minutes without calling. There is no evidence that these absences were related to illness.

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). The claimant was tardy five times between February 23 and March 5, 2011. 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. Therefore, benefits are denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of

determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The April 12, 2011, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css