

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEVI M KINNISON
Claimant

APPEAL NO. 11A-UI-02727-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KOSMITH INC
Employer

OC: 01/09/11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated February 24, 2011, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was scheduled for and held on March 29, 2011. Although duly notified, the claimant was not available at the telephone number he provided. The employer participated by Mr. Aaron Smith, Operations Supervisor/Co-Owner.

ISSUE:

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

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Levi Kinnison was employed by the captioned employer d/b/a McDonald's Restaurant from April 29, 2010 until January 5, 2011 when he was discharged for excessive absenteeism. Mr. Kinnison was employed as a part-time crew member and was paid by the hour. His immediate supervisor was Aaron Smith.

On December 20, 2010, Mr. Kinnison was issued a written warning and placed on employment probation status due to excessive absenteeism and violation of company policies. The claimant was warned at that time that future attendance violations could result in his termination from employment.

The claimant was discharged based upon his failure to report on January 5, 2011 and failure to provide proper notification or documentation of the necessity to be absent. On that date Mr. Kinnison did not report and did not personally notify the employer of his impending absence. The claimant had another individual call in for him. Subsequently, Mr. Kinnison told the employer that he had been diagnosed with "laryngitis" by his doctor and therefore did not work on January 5, 2011.

Because the claimant was a on final warning and because the employer had reasonable doubts about the credibility of Mr. Kinnison's statements, the employer requested supporting documentation from the claimant's physician to show that Mr. Kinnison actually visited the doctor as he had stated. The claimant provided no verification as required. The claimant did not return to the employer and provided no explanation.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

Iowa Code § 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.

In this matter the employer's witness participated personally and provided sworn testimony. Although given the opportunity to participate, Mr. Kinnison declined to do so. Mr. Kinnison was discharged when he violated a final warning that had been given to him by the employer regarding policy violations and excessive absenteeism. The claimant was placed on a probationary period and warned that future attendance violations could result in his termination from employment.

A decision was made to terminate Mr. Kinnison when he failed to report for work on January 5, 2011 and had another individual call in for him. Based upon the claimant's subsequent statements that he had visited a doctor and been diagnosed with "laryngitis" the employer was

reasonable in its request for some type of documentation showing that Mr. Kinnison had a valid reason for being absent. Although the claimant specifically indicated that he had already visited a doctor, he did not provide any type of verification that it was necessary for him to be absent or that it was reasonable to have another individual call in for him and a decision was therefore made to terminate the claimant from employment.

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct. The court held that the concept includes tardiness, leaving early, etc. The court further held that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. In this case the evidence establishes that the employer was reasonable in its belief that the claimant did not properly notify the employer personally as Mr. Kinnison supplied no documentation that he in fact did have laryngitis and was unable to speak or report to work. Benefits are denied.

Iowa Code § 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.

DECISION:

The representative's decision dated February 24, 2011, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs