IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

COLLIN J GRADY
1432 GRAND AVE
MUSCATINE IA 52761

MENARD INC
4777 MENARD DR
EAU CLAIRE WI 54703

Appeal Number: 06A-UI-00613-RT
OC: 12-25-05 R: 04
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Collin J. Grady, filed a timely appeal from an unemployment insurance decision dated January 13, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on February 1, 2006, with the claimant participating. Jody Martin, General Manager of the employer's store in Muscatine, Iowa, where the claimant was employed, participated in the hearing for the employer, Menard, Inc. The employer was represented by David Webb, Attorney at Law. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a part-time outside yard person from August 31, 2005 until he was discharged on December 13, 2005. The claimant averaged between 20 and 25 hours per week. The claimant was discharged for poor attendance. On December 12, 2005, the claimant was tardy 18 minutes because he had written down the wrong time that he was supposed to work. He did not call in this tardy. The employer has an attendance policy as shown at Employer's Exhibit One, a copy of which the claimant received and for which he signed an acknowledgment. Although not set out in that policy, the employer requires that an employee who is going to be absent or tardy call in and inform the employer of the absence or tardy prior to the start of the employee's shift. On December 2, 2005, the claimant was tardy 2 hours and 56 minutes and did not notify the employer. On or about October 30, 2005, or November 1, 2005, the claimant lost his vehicle and had to change his availability for work for the employer. He changed his availability sheet to show that he could only work from 12:00 noon until close on Saturday and Sunday. However, December 2, 2005, was a Friday. The claimant did not call in and notify the employer of this tardy. The claimant testified that he told his assistant manager earlier in the week that he would be tardy on that occasion. On November 27, 2005, the claimant was absent and did not notify the employer. The claimant was absent because he wrote down the wrong day that he was supposed to work. On October 13, 2005, the claimant was tardy 24 minutes again because he wrote down the wrong time that he was to be at work. The claimant did not notify the employer of this tardy. The claimant was also tardy on October 10, 2005, 4 hours and 31 minutes, because again he did not write down correctly the time he was to start. The claimant did not report this tardy. As shown at Employer's Exhibit Two, the claimant received a verbal warning with a written record on October 12, 2005; a verbal warning with a written record on October 14, 2005; and a written warning on November 29, 2005; and a suspension on December 5, 2005. All of these were for attendance. The claimant was then discharged after the tardy on December 12, 2005.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on December 13, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism and tardies. The evidence is uncontested that the claimant had four tardies and an absence as set out in the Findings of Fact. Three tardies and the absence were all due because the claimant did not write down the correct time that he was supposed to work. The claimant testified that the employer wrote down times in military time and he did not write down the correct times. However, the claimant received two verbal warnings with a written record and one written warning and one suspension for his attendance. By that time, the administrative law judge would have expected the claimant to have been extremely careful about writing down the times and days when he was to work. The claimant did not do so and was tardy once again on December 12, 2005, and discharged. There was some question about the tardy on December 2, 2005. The claimant testified that he was tardy on that occasion because it was outside his availability and he had so informed his assistant manager. The claimant was not available to start on Saturdays and Sundays until 12:00 noon and testified that this time he was scheduled to start at 9:00 a.m. This change in availability was due to a lack of transportation. However, December 2, 2005, was a Friday. There is also evidence that although the claimant claimed that he had changed his availability the employer's witness, Jody Martin, General Manager, testified that he was not aware of any change in the availability and when the claimant was suspended for this particular tardy the claimant never said anything about the change in his availability. The administrative law judge is not convinced

that the claimant was tardy on this occasion because of a change in his availability. Accordingly, the administrative law judge concludes that the claimant was absent on one occasion and tardy four times and none of them were for reasonable cause and none were properly reported and they are excessive unexcused absenteeism. Even assuming that the claimant was justified in being tardy on December 2, 2005, the claimant himself concedes that he was tardy on three occasions and absent once for writing down the wrong time which is without reasonable cause and none were properly reported. The administrative law judge would conclude that even those four occurrences were excessive unexcused absenteeism, especially in view of the claimant's warnings and suspension. In general three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982.) Even assuming the claimant's testimony is accurate in all respects, the claimant had three tardies and one absence that were not for reasonable cause and not properly reported and would still be excessive unexcused absenteeism. Accordingly, the administrative law judge concludes that the claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

DECISION:

The representative's decision of January 13, 2006, reference 01, is affirmed. The claimant, Collin J. Grady, is not entitled to receive unemployment insurance benefits until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism.

kkf/kjw