

**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**

**THOMAS P TULLY
318 – 51ST ST
DES MOINES IA 50312**

**ULTIMATE ELECTRONICS INC
c/o EMPLOYERS UNITY INC
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ARVADA CO 80006-9000**

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**Appeal Number: 05A-UI-04577-C
OC: 03/20/05 R: 02
Claimant: Appellant (2)**

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:

Thomas Tully filed an appeal from a representative's decision dated April 22, 2005, reference 02, which denied benefits based on his separation from Ultimate Electronics, Inc. After due notice was issued, a hearing was held on May 23, 2005 in Des Moines, Iowa. Mr. Tully participated personally and was represented by Rob Tully, Attorney at Law, who offered additional testimony from Paul Moreland. Exhibits A through L were admitted on Mr. Tully's behalf. The employer did not appear for the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Tully was employed by Ultimate Electronics, Inc. from September 13, 2004 until March 23, 2005 as a full-time sales associate. He was discharged from the employment and told it was due to repeated tardiness.

Mr. Tully had been late reporting to work on occasions in 2004 but was not disciplined. He and other employees were not disciplined when they were a few minutes late reporting for work. Mr. Tully did not start receiving discipline for his tardiness until he confronted the manager regarding conduct on the part of the manager that he believed was unethical. The confrontation occurred in November of 2004. Mr. Tully was told that, during a meeting in December, the manager told supervisors to do whatever it took to discharge Mr. Tully or make him quit. Although others were still not disciplined when they were late, the employer disciplined Mr. Tully on several occasions because of tardiness after he confronted the manager.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Tully was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). It was incumbent upon the employer to provide specific details concerning the reasons for discharge as mere allegations of misconduct are not sufficient to result in disqualification from benefits. 871 IAC 24.32(4). The employer did not participate in the hearing to provide evidence concerning Mr. Tully's tardiness.

Mr. Tully acknowledged that he was late reporting to work on some occasions. However, he contended that the employer's standards were not uniformly enforced as others were allowed to be late without repercussions. If the employer allows others to report to work late without consequences, it cannot be concluded that Mr. Tully's tardiness was contrary to the employer's standards. If employees are not uniformly disciplined regarding tardiness, then the employer does not really have a policy with respect to tardiness. Mr. Tully was credible in his testimony that he was tardy before November of 2004 but was not disciplined until he confronted his manager about perceived unethical conduct in November. If his discipline was only in retaliation for the confrontation, his discharge was not for misconduct.

After considering all of the evidence, the administrative law judge concludes that the employer has failed to present evidence to sustain its burden of proving disqualifying misconduct. Accordingly, no disqualification is imposed.

DECISION:

The representative's decision dated April 22, 2005, reference 02, is hereby reversed. Mr. Tully was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/pjs