

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DONALD N GAY**  
Claimant

**APPEAL NO. 09A-UI-15687-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LOWE'S HOME CENTERS INC**  
Employer

**OC: 09/20/09**  
**Claimant: Appellant (2)**

Section 96.5-1 -- Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated October 14, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 19, 2009. Claimant participated. Employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Donald Gay.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked at the employer's store in Davenport, Iowa, for approximately four years prior to his termination. At the date of discharge, September 21, 2009, he was a sales specialist in the millwork department. He sold windows and doors. He received a sales award in 2008.

When the claimant was hired, he explained to the employer that he did not have a driver's license and had to take the bus to work. He lived in Rock Island, Illinois. To make certain he would not be late, the claimant sometimes walked the eight miles between his home and the store. The claimant told the employer that he might occasionally be late if the bus ran behind schedule. The employer had no problem with this arrangement until a new manager took over in 2009. The claimant was four or five minutes late on September 21, 2009, due to the bus. The claimant was terminated for punching in late. The claimant acknowledged that he had been late three or four times previously, but had never received any written warning.

## REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct is found in deliberate acts or omissions that constitute a material breach of the worker's duty to the employer or in repeated acts of carelessness or negligence. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) The concept includes tardiness and leaving early. Absence due to matters of "personal responsibility", e.g. transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) The employer has the burden of proof to show misconduct.

In this case there is insufficient evidence to show misconduct. The claimant testified that he was terminated for punching in late on September 21, 2009. He had never received a written warning previously concerning attendance. Prior to a new manager coming on board, the employer essentially excused the claimant if he was late due to the running of the buses. There was no evidence from the employer whatsoever concerning its attendance policy and the number of unexcused absences that were attributable to the claimant and when those absences occurred. The employer had the burden of proof to show misconduct. The claimant's testimony stands un rebutted that he was terminated for punching in late on September 21, 2009, and that

he had not been previously warned concerning his attendance. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated October 14, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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