

**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**

**JERRY L COTTRELL
2145 CHANEY RD
DUBUQUE IA 52001**

**EAGLE WINDOW & DOOR INC
ATTN AMY TURNER
PO BOX 1072
DUBUQUE IA 52004-1072**

**Appeal Number: 04A-UI-08922-RT
OC: 07-18-04 R: 04
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Eagle Window & Door, Inc., filed a timely appeal from an unemployment insurance decision dated August 9, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Jerry L. Cottrell. After due notice was issued, a telephone hearing was held on September 8, 2004, with the claimant participating. Amy Turner, Human Resources Representative, participated in the hearing for the employer. Employer's Exhibits 1 and 2 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 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time material handler from May 20, 2002 until he was discharged on July 21, 2004. The claimant had also worked for the employer previously. The claimant was discharged for poor attendance. The claimant had various absences and tardies as shown at Employer's Exhibit 1 and as follows: July 21, 2004, the claimant was absent for personal reasons. He properly reported this absence. He was absent because he wanted to meet with his fiancée, with whom he was breaking up, and arrange to divide up certain property. The claimant believed that he would not be over the number of occurrences permitted by the employer but he did not bother to confirm with the employer this fact. As a result of this absence and others, the claimant was discharged.

The claimant was absent on January 24, 2004 because he was ill. He did try to call the employer but was unable to call the employer because the claimant was not calling the proper number. The claimant was absent on December 11, 2003 for personal illness but this was not called in in a timely fashion. The employer has a policy that requires that an employee who is going to be absent or tardy must notify the employer by calling a certain number provided by the employer at least 15 minutes before the start of the employee's shift. The employer prefers more than 30 minutes. On December 11, 2003, the claimant's call was not timely. On November 18, 2003, the claimant was absent because he overslept and his call to the employer was again not timely. On October 29, 2003, the claimant was absent and did not remember why and it was not timely reported to the employer. The claimant was absent on September 29, 2003 and again did not remember why but this absence was timely reported. The claimant left work early on July 30, 2003 and did not know why. The claimant was absent on July 28, 2003 because he overslept and did not report this to the employer. The claimant received four written warnings prior to his discharge as shown at Employer's Exhibit 2 on August 6, 2003; October 15, 2003; on or about November 10, 2003; and December 1, 2003. The final warning at Employer's Exhibit 2 was actually the claimant's discharge. Pursuant to his claim for unemployment insurance benefits filed effective July 18, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,764.00 as follows: \$161.00 for benefit week ending July 24, 2004 (earnings \$125.00); and \$229.00 per week for seven weeks from benefit week ending July 31, 2004 to benefit week ending September 11, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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, (7) provide:

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).

(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 testified, and the administrative law judge concludes, that the claimant was discharged on July 21, 2004. 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. The claimant's absences are set out in the Findings of Fact and at Employer's Exhibit 1. The claimant had five absences that were not for reasonable cause or personal illness on July 21, 2004; November 18, 2003; October 29, 2003; September 29, 2003; and July 28, 2003. Two of the absences were for oversleeping. The claimant could not remember the reason for two other absences and the final absence triggering his discharge on July 21, 2004 was because he met with his fiancée to sort property out and divide up property. The claimant testified that he did not think that that occurrence would put him over the limit prohibited by the employer. However, the claimant did not bother to confirm with the employer if he could be absent on that occasion even in the face of the claimant's numerous written warnings as set out below. It is the claimant's responsibility to keep track of his attendance. The claimant testified that his

supervisor told him that he was all right if he made it to July of 2004 but this is not credible. The claimant first said that the supervisor said through July and then later the claimant said the supervisor said the first part of July and then later the claimant said the supervisor said to make it to July. The evidence establishes that the claimant's absentee record was discussed with him on January 27, 2004 between the claimant's supervisor, the claimant and the employer's witness, Amy Turner, Human Resources Representative. Under these circumstances, the administrative law judge must conclude that this absent was not for reasonable cause or personal illness. Even assuming that the two absences which the claimant did not remember, were for reasonable cause or personal illness, three absences remain that were not for personal illness or reasonable cause. Further, five absences were not properly reported on January 24, 2004; December 11, 2003; November 18, 2003; October 29, 2003; and July 28, 2003. Finally, the claimant received four written warnings for his attendance as set out in the Findings of Fact and as shown at Employer's Exhibit 2.

Under the circumstances discussed above, the administrative law judge must conclude that the claimant's five absences that were not for reasonable cause or personal illness and a total of five which were not properly reported including one that was not in the above five when he was absent for personal illness on December 11, 2003 are excessive unexcused absenteeism and disqualifying misconduct. The claimant should have been well on notice that his attendance was of a concern to the employer with all of the written warnings. Accordingly, the administrative law judge concludes that the claimant was discharged for 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.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,764.00 since separating from his employer on or about July 21, 2004 and filing for such benefits effective July 18, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of August 9, 2004, reference 01, is reversed. The claimant, Jerry L. Cottrell, 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. He has been overpaid unemployment insurance benefits in the amount of \$1,764.00.

pjs/b