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

TRAVIS E VOMACKA
536 – 9TH ST SW
CEDAR RAPIDS IA 52404

INTERTRADE STEEL CORPORATION
PO BOX 1129
CEDAR RAPIDS IA 52406

Appeal Number: 05A-UI-07372-RT
OC: 06-12-05 R: 03
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, Travis E. Vomacka, filed a timely appeal from an unemployment insurance decision dated July 7, 2005, reference 02, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on August 3, 2005, with the claimant participating. Mike Shefelbine, Shop Supervisor, participated in the hearing for the employer.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time shear operator from October 11, 2004, until he was discharged on May 18, 2005, for

poor attendance. On May 16, 2005, the claimant had a doctor's appointment and left work early to attend the doctor's appointment. He had permission to do so. At that doctor's appointment, the claimant learned that he would have to have another doctor's appointment on May 18, 2005. The claimant worked on May 17, 2005, and made arrangements with the employer to attend the doctor's appointment on May 18, 2005, which doctor's appointment was at 2:30 p.m. The claimant agreed with the employer to come to work in the morning and then leave work early in the afternoon to attend the doctor's appointment. However, the claimant did not come in to work at all on May 18, 2005. The claimant did not do so because he was facing surgery coming up and needed to do some things at home such as laundry and cleaning up before his surgery. The claimant was capable of working that day. The claimant did notify the employer that he was not coming to work. When the claimant later came in to provide a doctor's excuse to the employer, he was discharged.

On May 4, 2005, the claimant was 15 minutes late returning from lunch because he had to take his car to get it repaired and was delayed in returning from lunch. Employees have a one-hour lunch break. On April 27, 2005, the claimant left work early 3¼ hours to go to court. The claimant had several matters pending in court, including traffic citations and other criminal charges. On April 22, 2005, the claimant was absent for the entire day because he had some kind of an appointment at 11:00 a.m. The claimant's workday started at 8:00 a.m. and he had no reason why he did not go to work at the beginning of the day and then left early for whatever appointment he had. The employer has a policy that requires that employees notify the employer by 8:00 a.m. if the employee is going to be late or tardy. In most cases the claimant complied with that policy. On April 20, 2005, the claimant was absent the entire day. He had court in the morning but then was sick in the afternoon, but he provided the employer no doctor's slip. The employer required a doctor's slip from the claimant for any absences due to illness. The claimant was absent the entire day on April 18, 2005. He had a doctor's appointment at 11:30 a.m. but had no excuse as to why he did not report to work and work until it was time to go to his doctor's appointment. The claimant was absent all day on April 14, 2005, for a doctor's appointment at 3:20 p.m. The claimant testified that he thought he had left work early but was equivocal, and the employer had records indicating the claimant was absent all day. The claimant had no reason as to why he did not go to work first and then attend the doctor's appointment later in the afternoon. The claimant was also tardy 2¼ hours on April 7, 2005, and did not remember why. The claimant left work early on April 6, 2005, four hours and did not remember why. The claimant was absent on March 15, 16, and 17, 2005, for personal illness. The claimant had a doctor's appointment on March 9, 2005, and left work early one and 1¼ hours. On March 4, 2005, the claimant left work one hour early for a lawyer's appointment. On March 3, 2005, the claimant left work early 1¾ hours. On March 2, 2005, the claimant left work early one-quarter hour. On March 1, 2005, the claimant left for lunch three quarters of an hour early and then took an additional hour for lunch. In January and February of 2005, the claimant had 19 attendance occurrences, 8 of which were absences. In 2005, the claimant was absent 167.75 hours out of the 800 hours that was possible to work. The claimant missed 21 percent of his work time. The claimant received a written warning on April 21, 2005, concerning his attendance and was informed that further attendance violations would result in his discharge. The claimant received two written warnings on March 16, 2005. In addition, the claimant received frequent oral warnings approximately once per week.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on May 18, 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.

The claimant's absences in March, April, May 2005 are set out in the findings of fact. In addition, the claimant had 19 attendance occurrences in January and February 2005, eight of which were absences. Out of the 800 hours that were possible to work in 2005, the claimant was absent 167.75 hours, or 21 percent of the working time. The administrative law judge believes that this is excessive. The claimant's testimony that he was sick and had to miss all of this time or that he had problems with court was not entirely credible. The claimant testified that

he developed an infection in November which required immediate surgery but he did not have medical insurance so he put it off until the middle of May 2005. However, the evidence establishes that the claimant had insurance from his employment beginning January 11, 2005, and the claimant did not bother to schedule surgery for four months. The claimant testified that he got the insurance in February but did not want to have surgery right away. However, even believing the claimant, he waited two months to have surgery that he had earlier testified was necessary immediately. This taints the claimant's entire testimony. Finally, the administrative law judge concludes that the claimant's absences on April 14, 18, 20, and 22, 2005, were not for reasonable cause. On each of those days the claimant had only an obligation in the afternoon or the morning, but the claimant chose to be absent the entire day and provided no reasons why. These absences occurred after two written warnings and numerous oral warnings. The claimant was also late returning from lunch on May 4, 2005, to take his car to be repaired, and this is not for reasonable cause. Finally, the claimant was once again absent on May 18, 2005, for a doctor's appointment at 2:30 p.m. but did not come to work at all, and the claimant conceded at the hearing that he was capable of working in the morning but chose not to do so to prepare for his surgery, doing things like laundry and cleaning up. These things could have been done on the claimant's own time. The administrative law judge is constrained to conclude that these absences are not for reasonable cause and are excessive unexcused absenteeism. The claimant was aware, or should have been aware, that his attendance was of concern because he received three written warnings as set out in the findings of fact. The claimant also received numerous oral warnings. The claimant testified that he believed these were jokes but the employer's witness credibly testified that he was not joking about the claimant's attendance and the administrative law judge does not believe that the employer was joking and the claimant was unreasonable in believing that the employer was joking about his attendance.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences were excessive unexcused absenteeism and disqualifying misconduct and, as a consequence, the claimant 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 July 7, 2005, reference 02, is affirmed. The claimant, Travis E. Vomacka, 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.

pjs/kjw