

**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**

**NORMAN V PULLEN
101 W ASH ST
PO BOX 68
ROLAND IA 50236-0068**

**BURKE MARKETING CORPORATION
PO BOX 209
NEVADA IA 50201-0209**

**Appeal Number: 04A-UI-05640-RT
OC: 04/25/04 R: 02
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Burke Marketing Corporation, filed a timely appeal from an unemployment insurance decision dated May 11, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Norman V. Pullen. After due notice was issued, a telephone hearing was held on June 11, 2004, with the claimant participating. Pat Waltemeyer, Senior Human Resources Clerk, participated in the hearing for the employer. 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. Although not set out on the notice of appeal, the parties permitted the administrative law judge to take evidence on and decide, if necessary, the issue as to whether the claimant is overpaid unemployment insurance benefits under Iowa Code Section 96.3-7.

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 mixer-operator from July 14, 2003 until he was discharged on April 23, 2004 for poor attendance. The claimant had absences as set out in Employer's Exhibit One. The claimant had no tardies. All of the claimant's absences were properly and timely reported either by the claimant or by his wife. The claimant was absent on August 13, 2003 because the sewer line broke at his home and he had to remain home to work on that. The claimant was absent for personal illness on August 29, 2003, October 3, 2003, November 7, 2003, November 11, 2003, and April 5, 2004. The claimant provided a doctor's excuse for the absence in August and the two absences in November. The employer had no evidence that the claimant was not ill on those occasions. The claimant was also absent on December 8 and 9, 2003 because he was snowed in in western Iowa. The claimant had to go to western Iowa because his mother-in-law was ill. The claimant had requested the time off and believed that it had been approved. The claimant was also absent on February 12, 2004 but this was a personal day approved by the employer. The claimant was absent this day because he had to take his wife to see his ill mother-in-law. Although the claimant's last absence that gave rise to his discharge occurred on April 5, 2004, the claimant was not discharged until April 23, 2004, almost three weeks after the absence. The claimant did get a verbal warning and a written warning both on December 10, 2003 as shown at Employer's Exhibit Two and also two attendance advisories on October 6, 2003 and November 18, 2003, also as shown at Employer's Exhibit Two.

Pursuant to his claim for unemployment insurance benefits filed effective April 25, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,866.00 as follows: \$311.00 per week for six weeks from benefit week ending May 1, 2004 to benefit week ending June 5, 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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), (8) 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).

(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.

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet 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 testimony of the two witnesses was remarkably similar. The claimant had all of the absences as set out in Employer's Exhibit One and in the Findings of Fact. Both parties concede that the claimant or his wife properly and timely reported all of the absences. The parties also concede that the claimant had no tardies. On August 13, 2003, the claimant was absent because a sewer line at his home broke and he had to repair it or help with the problem. The administrative law judge concludes that this absence was for reasonable cause. The claimant also had five absences for personal illness. For three of the absences, the claimant provided a doctor's excuse. The employer had no evidence that the claimant's absences were not for personal illness. The employer's witness

did testify that on some occasions when the claimant properly reported his absence, he did not indicate that he was sick, but the claimant contradicted this. The administrative law judge concludes that even if the claimant or his wife failed to indicate that the claimant was sick that is not necessarily evidence that the claimant was not sick. Accordingly, the administrative law judge concludes that these absences were for personal illness. The claimant had two absences because he was snowed in in western Iowa because he was visiting his ill mother-in-law. The administrative law judge concludes that these absences were for reasonable cause. Further, the administrative law judge notes that the claimant credibly testified that he had requested days off for these absences and thought that they had been approved. Finally, the claimant was absent on February 12, 2004 again because his mother-in-law was ill and for this he took a personal day, which was excused by the employer. This absence also was for reasonable cause. Accordingly, the administrative law judge concludes that all of the claimant's absences were for personal illness or other reasonable cause and were properly reported and were not excessive unexcused absenteeism. It is true that the claimant received a written warning and a verbal warning on December 10, 2003 and two attendance advisories but nevertheless is constrained to conclude that the claimant's absences were not excessive unexcused absenteeism. The employer here has a point attendance policy but that is irrelevant to the inquiry here. Excessive unexcused absenteeism is specifically defined as absences not for reasonable cause or for personal illness and not properly reported.

The administrative law judge is also concerned that the claimant was not discharged until April 23, 2004, almost three weeks after the last absence on April 5, 2004 that triggered his discharge. A discharge for misconduct cannot be based on past acts and it would appear here that the claimant's discharge on April 23, 2004, was based on past acts namely April 5, 2004. The employer's witness had no real explanation as to why the claimant's supervisor waited until after April 12, 2004 to discharge the claimant. She did testify that the attendance was not entered into the computer until April 12, 2004, but there is no explanation why the employer waited 11 days more to discharge the claimant.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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 \$1,866.00 since separating from the employer herein on or about April 23, 2004 and filing for such benefits effective April 25, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated May 11, 2004, reference 01, is affirmed. The claimant, Norman V. Pullen, is entitled to receive unemployment insurance benefits provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant has not been overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kjf/b