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

JASON A DEVOS
701 – 4TH AVE
SHELDON IA 51201-1513

ADVANCE BRANDS LLC
ATTN BECKY WESTER
101 – 14TH ST SE WAY
ORANGE CITY IA 51041

Appeal Number: 06A-UI-02622-RT
OC: 02/05/06 R: 01
Claimant: Respondent (1-R)

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, Advance Brands LLC, filed a timely appeal from an unemployment insurance decision dated February 27, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Jason A. DeVos. After due notice was issued, a telephone hearing was held on March 22, 2006, with the claimant participating. Becky Wester, Human Resources Assistant Manager, 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.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time sanitation crew member from July 20, 2005, until he separated from his employment on February 7, 2006. At that time he was told that he could no longer work. He was told that he had run out of attendance points under the employer's Attendance Policy. The employer has an Attendance Policy as shown at Employer's Exhibit One. This policy is in the employer's handbook, a copy of which the claimant received and for which he signed an acknowledgement as shown also at Employer's Exhibit One. The employer treats employees who run out of attendance points under their policy as a voluntary quit. The employer also requires that employees notify the employer of an absence or a tardy and although not set out in the written policies, at orientation the employees are told that they need to call one-half hour before the start of their shift. The claimant was aware of this requirement.

On February 3, 2006, the claimant was absent because of personal illness. He properly notified the employer by leaving a message. On February 2, 2006, the claimant was absent again for personal illness but he did not notify the employer because he was on medication which caused him to sleep. The claimant had not made arrangements in some fashion to have the employer called about this absence. On January 4, 2006, the claimant was absent for personal illness and he properly notified the employer. On December 14, 2005, the claimant was absent because of weather and he properly notified the employer. On November 30, 2005, the claimant was absent without giving the employer a reason but he did notify the employer properly of this absence. On November 10, 2005, the claimant was absent because of a knee injury. The claimant was involved in a car accident on or about October 13, 2005 which injured his knee and his knee required continual medical treatment. The claimant did work after the accident but had to miss some work for continued treatment for the knee. The employer was aware of the car accident and that the claimant had injured his knee.

The claimant was absent either on November 1 or 2, 2005 or November 9 and 10, 2005 again because of his knee injury and this was properly reported to the employer. The claimant was absent on October 25 and 26, 2005 again because of his knee injury and these absences were properly reported to the employer. The claimant was absent on October 21, 2005, but gave no reason but did notify the employer of this absence. The claimant was tardy one minute on October 16, 2005, but individuals who commuted with him to work were timely in reporting to work on that day. The claimant was absent on October 13 and 14, 2005 because of his car accident and the injury to his knee. He properly notified the employer. The claimant was absent on August 23, 2005, for personal illness and he properly notified the employer. The claimant received four written warnings as shown at Employer's Exhibit Two as follows: January 17, 2006; December 28, 2005; approximately November 30, 2005; and approximately November 17, 2005. Pursuant to his claim for unemployment insurance benefits filed effective February 5, 2006, the claimant has received unemployment insurance benefits in the amount of $2,029.00 as follows: $259.00 for the benefit week ending February 11, 2006 (earnings $109.00); and $295.00 per week for six weeks from the benefit week ending February 18, 2006 to the benefit week ending March 25, 2006.

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 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit on February 7, 2006 because he had exhausted his attendance points under the employer's Attendance Policy. At most, according to the testimony of the employer's witness, Becky Wester, Human Resources Assistant Manager, the claimant was absent for two consecutive days, February 2 and 3, 2006, as a no-call/no-show. In order to establish a voluntary quit for absences as a no-call/no-show there must be three consecutive absences. See 871 IAC 24.25(4). The claimant maintains that he was discharged for attendance. Under the evidence here, the administrative law judge concludes that the claimant did not voluntarily quit but was discharged on February 7, 2006 for poor attendance.

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 that 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). 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 claimant did have a number of absences and one tardy as set out in the Findings of Fact. However, most of those absences were for personal illness or injury and properly reported to the employer. The claimant was involved in an automobile accident on or about October 14, 2005 which resulted in an injury to his knee. His knee injury then required periodic medical treatments which required the claimant to be absent. The employer was aware of the car accident and the knee injury. All such absences were properly reported except for the claimant's absence on February 2, 2006. The employer testified that the claimant did not notify the employer on February 3, 2006, but the claimant credibly testified that he did call in and left a message and the administrative law judge concludes that the absence was properly reported. The claimant concedes that he did not properly report the absence on February 2, 2006 because he was highly medicated. The administrative law judge concludes that this was a reason for the claimant not to report his absence. Therefore, the administrative law judge concludes that all of the absences set out in the Findings of Fact for personal injury or illness were for personal injury or illness and were properly reported or the claimant was justified in not properly reporting and are not excessive unexcused absenteeism.

The claimant testified that he was not absent on November 30, 2005 and October 21, 2005 even though the employer's records demonstrate otherwise as does the testimony of Ms. Wester. The administrative law judge concludes that the claimant was probably absent on those two days but probably for his knee injury because the administrative law judge notes that the claimant had numerous absences during this period of time for his knee injury. Ms. Wester testified that both of these absences were properly reported. Ms. Wester testified that the claimant was tardy on October 16, 2005 one minute. The claimant testified that he did not believe that he was tardy because two others who rode with him to work clocked in on time. The administrative law judge concludes that even if the claimant was tardy by one minute, that this is so insignificant as to be de minimus. Accordingly, the administrative law judge concludes that the absences are not excessive unexcused absenteeism. The administrative law judge concludes that the claimant really did not have a tardy.

Even if the claimant's absences on November 30, 2005 and October 21, 2005 were not for personal illness or injury or for other reasonable cause, the administrative law judge would still

conclude that they do not establish excessive unexcused absenteeism. In general, three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here the claimant only had two. It is true that the claimant received four written warnings for his attendance and that the claimant did have a number of absences for personal illness or injury but the administrative law judge concludes, nevertheless, that the claimant was in fact ill or injured on those occasions and there is no evidence to the contrary.

In summary, 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.

In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able to work under Iowa Code section 96.4-3. The claimant testified at the hearing that he has had severe knee problems since his automobile accident on or about October 13, 2005 and that his knee problems are continuing.

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 $2,029.00 since separating from the employer herein on or about February 7, 2006, and filing for such benefits effective February 5, 2006. The administrative law judge concludes that, insofar as the claimant's separation from employment is concerned, that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 27, 2006, reference 01, is affirmed. The claimant, Jason A. DeVos, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able to work under Iowa Code section 96.4 (3). As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able to work under Iowa Code section 96.4-3 because of his knee injury.

cs/tjc