

**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**

**NOAH M JOHNSON
4710 STONE PARK BLVD
SIOUX CITY IA 51103**

**SC FAMILY STEAK INC
D/B/A SIRLOIN STOCKADE
PO BOX 1866
GRAND ISLAND NE 68802-1866**

**Appeal Number: 06A-UI-03100-RT
OC: 04/24/05 R: 01
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, SC Family Steak, Inc., doing business as Sirloin Stockade, filed a timely appeal from an unemployment insurance decision dated March 7, 2006, reference 05, allowing unemployment insurance benefits to the claimant, Noah M. Johnson. After due notice was issued, a telephone hearing was held on April 26, 2006, with the claimant participating. Dennis McGraw, General 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.

An initial hearing was scheduled in this matter for April 5, 2006 at 10:00 a.m. and rescheduled by the administrative law judge because of a tornado drill. The administrative law judge had spoken to the claimant's mother at 1:42 p.m. on March 22, 2006 about a continuance of the hearing because the claimant might not be available but the claimant's mother withdrew the request for a continuance but, in any event, the hearing was continued because of the tornado drill.

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 part-time Broiler Cook from July 28, 2005, until he was discharged on February 8, 2006. The claimant averaged between 25 and 30 hours per week. The claimant was discharged for poor attendance. On February 7, 2006, the claimant was absent because he had "mixed up" his schedule. He did not notify the employer of his absence. The next day, February 8, 2006, the claimant was discharged. The employer has a policy that requires that an employee call or notify the employer three hours before the start of the employee's shift if that employee is going to be absent or tardy. The claimant was also absent on January 15, 2006 and did not notify the employer. The claimant did not remember why he was absent on that occasion. The claimant was also absent for his morning shift on January 10, 2006 and did not notify the employer. The claimant did not know why he missed his morning shift. In addition to these absences in 2006 the claimant had numerous tardies in 2006 as follows: February 5, 2006, one hour; February 3, 2006, four minutes; January 28, 2006, one-half hour; January 19, 2006, seven minutes; January 13, 2006, fifteen minutes; January 10, 2006, twelve minutes from his evening shift; January 7, 2006, eight minutes; January 6, 2006, four minutes; and January 5, 2006, one hour. The claimant did not properly report these tardies. The claimant also had absences and tardies in 2005 as shown at Employer's Exhibit One. The claimant received two verbal warnings for his attendance and then a written warning on January 15, 2006, which is shown at Employer's Exhibit Two. Pursuant to his claim for unemployment insurance benefits filed effective April 24, 2005, and reopened effective February 12, 2006, the claimant has received unemployment insurance benefits in the amount of \$134.00 since separating from the employer herein as follows: \$67.00 for two weeks, benefit weeks ending February 18 and 25, 2006. The claimant also received benefits prior to his employment with the employer herein but those are not relevant here.

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 agree that the claimant was discharged but disagree as to the date. Although it makes little difference here, the administrative law judge concludes that the claimant was discharged on February 8, 2006 when he showed up for work and was informed of his discharge after being absent the day before, February 7, 2006. 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 and tardies. The employer's witness, Dennis McGraw, General Manager, credibly testified to numerous absences and tardies by the claimant. His testimony was credible because he was testifying from employer's records. The claimant did not recall the tardies and most of the absences. The administrative law judge concludes that the claimant had two absences in 2006 that were not for reasonable cause or personal illness and not properly reported; February 7, 2006, when the claimant was absent because he "mixed up" his schedule and January 15, 2006 when the claimant did not know why he was absent. The claimant did not properly report either absence

although the employer has a policy that requires that an employee who is going to be absent notify the employer three hours before the shift is to start. The claimant testified that he was not aware of this policy but this is not credible because the claimant received verbal warnings and one written warning concerning his attendance before he was discharged. The claimant was also absent from his morning shift on January 10, 2006 but did not remember why and did not notify the employer. The claimant also had nine tardies in 2006, one of the tardies for his afternoon shift, but he could not remember why. The claimant did not properly report any of these tardies. The administrative law judge concludes that these tardies were not for reasonable cause or personal illness and not properly reported. The claimant had other absences and tardies in 2005 as shown at Employer's Exhibit One. The claimant received two verbal warnings for his attendance and then a written warning on January 15, 2006 as shown at Employer's Exhibit Two. Accordingly, the administrative law judge concludes that in a little more than two months the claimant had three absences and nine tardies, none of which were for personal illness or reasonable cause and none of which were properly reported. The administrative law judge concludes that these absences and tardies were excessive unexcused absenteeism and disqualifying misconduct. Therefore, 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 \$134.00 since separating from the employer herein on or about February 8, 2006 and reopening his claim for benefits effective February 12, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of March 7, 2006, reference 05, is reversed. The claimant, Noah M. Johnson, 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 \$134.00.

cs/tjc