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

Appeal Number: 05A-UI-11627-RT
OC: 03-20-05 R: 03
Claimant: Appellant (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.

CRYSTAL M JACOBUS
86 AOSSEY LN #6
CEDAR RAPIDS IA 52404

ROBERT JOHNSTON ET AL
H J HEINZ CO LP
MUSCATINE FACTORY
1357 ISETT AVE
MUSCATINE IA 52761

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Crystal M. Jacobus, filed a timely appeal from an unemployment insurance decision dated November 4, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on December 1, 2005, with the claimant participating. The employer, Robert Johnston et al, H. J. Heinz Company LP, doing business as Muscatine Factory, did not participate in the hearing because the employer did not call in, either before the hearing or during the hearing, telephone numbers where any witnesses could be reached for the hearing, as instructed in the Notice of Appeal. The Notice of Appeal was sent to the employer on November 16, 2005. Under separate envelope documents attached to the claimant's appeal were also sent to the employer on November 16, 2005. The administrative law judge takes official notice of Iowa Workforce Development Department

unemployment insurance records for the claimant. Claimant's Exhibits A and B were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 worker who weighed spices, from January 27, 2003 until she was discharged on October 19, 2005. The claimant was discharged for poor attendance. The claimant was absent on October 17 and 18, 2005 because her child was sick. This is confirmed by a doctor's statement at Claimant's Exhibit A. The claimant called the employer at 4:30 a.m. on October 17, 2005 and informed the employer that she was going to be absent that day and did not know about the next day. The next day the claimant believed she was calling at 4:30 p.m. but it could have been 5:30 p.m. The claimant's shift begins at 5:00 p.m. The employer had an old rule that required that employees who were going to be absent notify the employer no later then two hours after the employee's shift was to start. This changed approximately two weeks before the claimant's discharge to a requirement that an employee notify the employer one half hour before the start of the employee's shift. The claimant knew that the change was coming but did not know that it had gone into effect. The claimant was then discharged on October 19, 2005 when she returned to work. The claimant had other absences as shown at Claimant's Exhibit B. The absences were all for personal illness or the illness of her child or for weather. The claimant properly reported all of these absences. On February 7 and 8, 2005, the claimant was unable to drive to work. She did call the employer and properly notify the employer of her absences. She offered to come to work if someone from the employer could come and get her which the employer sometimes did for employees who were stranded because of weather. However, the employer did not come to get the claimant on either day. The claimant did have five tardies of just a few minutes. The tardies were due either because of problems the claimant had in getting in the door at the employer's location or commuting delays. The claimant received only an oral warning for attendance sometime ago and received no warning within a reasonable time prior to her discharge.

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 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 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).

871 IAC 24.32(7) provides:

> (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 claimant credibly testified, and the administrative law judge concludes, that she was discharged on October 19, 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). 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, including, excessive unexcused absenteeism. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interest and/or carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences or tardies on the part of the claimant that were not for reasonable cause or personal illness and not properly reported.

The claimant credibly testified that she was discharged after two absences on October 17 and 18, 2005, because her child was sick. The illness of her child is confirmed at Claimant's Exhibit A which is a doctor's statement. The claimant thought that she had properly reported both absences. The employer had an old rule that required that an employee notify the employer of an absence or a tardy no later then two hours after the start of the employee's shift. The claimant did so on those two days. However, the rule had changed to requiring an employee to notify the employer one half hour before the claimant's shift started, but the claimant was not

aware the change had gone into effect. In any event, the claimant believed that she had called the employer at 4:30 a.m. on both days which would have been timely under the new rule since the claimant's shift began at 5:00 p.m. The administrative law judge concludes that these absences were for reasonable cause and were properly reported or the claimant was justified in failing to properly report them. The claimant also had other absences and tardies as shown at Claimant's Exhibit B. The absences were due to her own personal illness or the illness of a child or because of weather and all were properly reported. The administrative law judge concludes that these absences were for personal illness or reasonable cause and also properly reported. The claimant had five tardies. The tardies were all brief tardies because either the claimant had problems with the employer's front door or because of commuting problems. Since the claimant was just a minute or two late for these tardies the claimant was justified in not reporting them at least in the absence of any evidence to the contrary. The administrative law judge concludes that these tardies were for reasonable cause and the claimant was justified in not reporting these tardies to the employer. Finally, the claimant only received one oral warning for attendance sometime ago and received no warnings about her attendance in a reasonable time prior to her discharge. Accordingly, the administrative law judge concludes that claimant's absences and tardies were for reasonable cause or personal illness and properly reported or the claimant was justified in failing to report them and therefore the absences and tardies are not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

DECISION:

The representative's decision of November 4, 2005, reference 01, is reversed. The claimant, Crystal M. Jacobus, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

kkf/kjw