

**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**

**DAVID D NAIL
2758 – 211TH AVE
DONNELSON IA 52625**

**TEMP ASSOCIATES
1000 N ROOSEVELT AVE
BURLINGTON IA 52601**

**Appeal Number: 05A-UI-05717-HT
OC: 04/24/05 R: 04
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

STATEMENT OF THE CASE:

The employer, Temp Associates, filed an appeal from a decision dated May 18, 2005, reference 03. The decision allowed benefits to the claimant, David Nail. After due notice was issued a hearing was held by telephone conference call on June 17, 2005. The claimant participated on his own behalf. The employer participated by Branch Manager Deborah Eagleman.

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: David Nail was employed by Temp Associates from November 7, 2004 until February 22, 2005. He was assigned to Mt. Pleasant Foods.

During the course of his employment, the claimant was frequently absent due to illness. Each absence was reported to Temp Associates and Mt. Pleasant Foods as required by policy. However, only absences covered by a doctor's excuse will not be counted against the employee. Mr. Nail was aware of this but indicated he did not go to the doctor every time for colds and flu because he could not afford it and when he did seek medical attention he was merely told to rest and drink fluids.

The employer did issue a warning to him on or about February 14, 2005, but it was never delivered to him or signed by him. He had missed nine days of work without a doctor's excuse since beginning the assignment. His final absence was on February 22, 2005, which he did report to both the employer and the client company. However, Mt. Pleasant Foods requested him to be removed from the assignment after this last absence.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 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 was absent a great deal due to illness. The employer has no proof to the contrary that he was, in fact, not ill on these occasions, and has acknowledged they were all properly reported. A properly reported illness cannot be considered misconduct as it is not volitional. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). There was no current, final act of misconduct as required by 871 IAC 24.32(8) and disqualification may not be imposed.

DECISION:

The representative's decision of May 18, 2005, reference 03, is affirmed. David Nail is qualified for benefits, provided he is otherwise eligible.

bgh/sc