

**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**

**RONALD J AGUILAR
6310 URBANDALE AVE #4
URBANDALE IA 50322**

**FOODS INC
4343 MERLE HAY RD
DES MOINES IA 50310**

**Appeal Number: 04A-UI-00020-RT
OC: 11/23/03 R: 02
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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Ronald J. Aguilar, filed a timely appeal from an unemployment insurance decision dated December 22, 2003, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on January 27, 2004, with the claimant participating. The employer, Foods, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. 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, the administrative law judge finds: The claimant was employed by the employer as a full-time stocker from June 2002 until he was separated from his employment on November 24, 2003. On November 19, 2003, the claimant came to work and right after coming to work got an emergency phone call concerning his family in Minnesota. The claimant had to go home quickly to get a calling card to call others to find out about the family emergency in Minnesota. He remarked to his manager that he would be back in a few minutes. However, the claimant discovered that the emergency in Minnesota was severe and he had to immediately go to Minnesota and did not return to work. The claimant was absent on November 19, 20, and 21, 2003. The claimant was absent because he had to go to Minnesota to deal with the family emergency. The claimant did not call or notify the employer on any of those days that he was going to be absent. The claimant was too emotional and too involved in what he was doing in Minnesota to call the employer. The claimant returned to Iowa on November 21, 2003 and met with the employer at approximately 5:00 p.m. on that day. The claimant's shift usually started at 7:00 a.m. The claimant talked to Mark Brassi, Store Director. He apologized for not calling and explained why he had been gone. He asked Mr. Brassi about his scheduled. Mr. Brassi said at that time that he would have to consider the situation and the claimant would need to call him on Monday, November 24, 2003. The claimant called Mr. Brassi on that day and was informed that he was terminated. The claimant had never had any absences or tardies from his employment and he had never received any warnings or disciplines for his attendance. There is no evidence that the employer has a policy that provides for voluntary quit when an employee is going to be absent for three days as a no-call/no-show.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from the employment was a disqualifying event. It was 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) 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.

The first issue to be resolved is the character of the separation. The employer seems to maintain that the claimant quit, but the employer did not participate in the hearing to provide evidence to that effect. The claimant maintains that he was discharged by a telephone call from Mark Brassi, Store Director, on November 24, 2003. The claimant credibly testified at the hearing that he was not aware that the employer had a policy requiring that three consecutive days without informing the employer is a voluntary quit. The claimant was called away for an emergency in Minnesota and as soon as he could possibly return to Iowa he did. The claimant immediately went to the employer on November 21, 2003 after being gone for three days including November 21, 2003 and explained the situation to the employer and asked about scheduling. This action by the claimant does not indicate that the claimant had intended to quit. In the absence of evidence that the employer had a policy providing that three consecutive absences as a no-call/no-show without informing the employer is a voluntary quit, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant both demonstrated an intention to terminate the employment relationship and performed an overt act to carry out that intention as required for a voluntary quit by Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). Accordingly, the administrative law judge concludes that the claimant did not leave his employment voluntarily, but was discharged by the telephone call from Mr. Brassi on November 24, 2003.

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 claimant credibly testified that he had never had any absences or tardies previously and had received no warnings. The claimant was discharged for three absences on November 19, 20, 21, 2003. The claimant credibly testified that he was absent on those three days because of a family emergency in Minnesota requiring him to immediately go to Minnesota. The claimant also credibly testified that he did not inform the employer. The claimant explained that he was too emotional and too involved in the family emergency to call the employer. Under the record here, the administrative law judge is constrained to conclude that the claimant's absences were for reasonable cause. However, the administrative law judge also is constrained to conclude that these absences were not properly reported. The issue then becomes whether the claimant has demonstrated sufficient justification for failing to report these absences to the employer. In this case, the administrative law judge concludes that the claimant has demonstrated justification. The claimant did inform his manager on November 19, 2003 that he had a family emergency and that he had to go home, but that he would be back in few minutes. The employer was on some notice at least that the employee had some kind of an emergency. The claimant also testified that he was too emotionally involved and too overtaken by the problems in Minnesota to call the employer, but he immediately returned to the employer when he came back to Iowa. Generally, three unexcused absences are required to establish excessive unexcused absenteeism and disqualifying misconduct. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here the claimant had three absences which were for reasonable cause but not properly reported. Here, the administrative law judge concludes that at least his failure to properly report some of the absences was justified and therefore the administrative law judge concludes that the claimant's absences 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, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

DECISION:

The representative's decision of December 22, 2003, reference 01, is reversed. The claimant, Ronald J. Aguilar, is entitled to receive unemployment insurance benefits provided he is otherwise eligible.

kjf/b