

**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**

**ERIC C THOMPSON
301 E 17TH ST N
NEWTON IA 50208-3446**

**WEAVER ENTERPRISES LTD
PO BOX 3280
PEORIA IL 61612-3280**

**Appeal Number: 06A-UI-04782-RT
OC: 04/02/06 R: 02
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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Weaver Enterprises, Limited, filed a timely appeal from an unemployment insurance decision dated April 28, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Eric C. Thompson. After due notice was issued, a telephone hearing was held on May 18, 2006, with the claimant participating. Terry Moffit, Director of Operations, and Joe Rechtfertig, Area Supervisor, 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 team member from March 20, 2005, until he was discharged on April 3, 2006. The claimant was discharged for attendance. On April 2, 2006, the claimant was tardy over three hours because he was not aware of a change in the schedule. The employer posts a schedule on the Sunday before the next Thursday, which is the start of the week covered by the schedule. The employer frequently changes this schedule, sometimes simply writing changes onto the schedule and other times replacing an old schedule with a new schedule. The claimant believed that he was supposed to work from 4:00 p.m. until close. However, the claimant was shown on the schedule to be working from 8:00 a.m. until 4:00 p.m. A co-worker noticed that the claimant was not there and called the claimant. The claimant called the employer and asked if he was on the schedule. When he learned that he was and was told to come to work, he did so and worked the remainder of his shift. The claimant was then discharged the next day. The schedule appears at Employer's Exhibit One and does not appear to be altered but it was a new schedule from that which the claimant had seen when he had checked previously and noted that he was to work from 4:00 p.m. until close. Often employees are called by the employer about changes in the schedule but no one called the claimant in regards to this schedule change.

On March 13, 2006, the claimant was tardy 1½ hours because he overslept. He did not properly report this tardy. The employer had no record of any other absences or tardies and any absences or tardies that the claimant had were excused by the employer. The claimant received a final written warning for attendance on March 13, 2006 for the tardy on that day as shown at Employer's Exhibit Two. The claimant received no other warnings. Pursuant to his claim for unemployment insurance benefits filed effective April 2, 2006, the claimant has received unemployment insurance benefits in the amount of \$952.00 as follows: \$136.00 per week for seven weeks from the benefit week ending April 8, 2006 to the benefit week ending May 20, 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 96.5-2-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 parties testified, and the administrative law judge concludes, that the claimant was discharged. The parties disagree as to the date of the discharge. The employer's witnesses testified that the claimant was discharged on April 2, 2006. The claimant testified that he was discharged on April 3, 2006. Although it makes little difference here, the administrative law judge concludes that the claimant was discharged on April 3, 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). 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. No other reason was given for the discharge except for the claimant's attendance. The evidence establishes that the claimant was tardy over three hours on April 2, 2006. However, the claimant had an explanation. The claimant credibly testified that he had checked the schedule posted for that week and had noted that he was to work the shift from

4:00 p.m. until closing. However, the schedule was changed and the claimant was not notified of the change and therefore was tardy. The claimant called the employer after being called by a co-worker who informed the claimant that he was on the schedule to begin at 8:00 a.m. through 4:00 p.m. When the claimant called the employer he asked if he was on the schedule and he was told that he was and was asked to come to work. He did so and worked the remainder of his shift. The administrative law judge concludes that this tardy was for reasonable cause and the claimant had an excuse for not properly reporting the tardy and therefore this tardy is not excessive unexcused absenteeism.

The only other absence or tardy in the record was a tardy on March 13, 2006 for 1½ hours when the claimant overslept. The administrative law judge does conclude that this tardy was not for reasonable cause or personal illness and not properly reported. There was no other evidence of any other absences or tardies at least those that were not excused. The issue really becomes whether one unexcused tardy establishes excessive unexcused absenteeism. The administrative law judge concludes that it does not. The term “excessive unexcused absenteeism” implies more than one absence or tardy and 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 one such tardy. Even assuming that the tardy on April 2, 2006 was also not for reasonable cause or personal illness and not properly reported, the claimant would only have two such tardies and not three. It is true that the claimant received a final written warning on March 13, 2006 but this was for the one tardy noted above which was not excused. Accordingly, the administrative law judge concludes that the claimant’s tardies and absences were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged 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.

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 \$952.00 since separating from the employer herein on or

about April 3, 2006 and filing for such benefits effective April 2, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 28, 2006, reference 01, is affirmed. The claimant, Eric C. Thompson, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

cs/pjs