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 S BOXWELL
1517 W 2ND ST
WATERLOO IA 50701-2709

HCM INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-04046-RT
OC: 03/12/06 R: 03
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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, HCM, Inc., filed a timely appeal from an unemployment insurance decision dated April 5, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Ronald S. Boxwell. After due notice was issued, a telephone hearing was held on May 1, 2006, with the claimant participating. Deb Smith was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary. Lora Duncan, Registered Nurse, participated in the hearing for the employer. Sandy Davies, Assistant Director of Nursing, and Jean Eckert, Administrator, were available to testify for the employer but not called because their testimony would have been repetitive and unnecessary. Employer's Exhibit One

was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Maggie Austin was initially to be a witness for the employer but when the administrative law judge called the employer for the hearing Ms. Austin was home sick. Because the administrative law judge had never been called for a continuance and the employer had other witnesses available to testify, the administrative law judge did not continue or postpone the hearing. The administrative law judge now concludes that the testimony of Ms. Austin is not necessary for a determination of this matter.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time certified nurse's aid (CNA) from February 25, 2005, until he separated from his employment on March 15, 2006. On March 10, 2006, the claimant was ill and had a doctor's excuse to be absent. However, the employer called the claimant and explained that it needed him to come to work because the employer was short staffed. The claimant informed the employer that he would come to work even though he was ill if there was plenty of help available. The claimant was informed that there was plenty of help, namely, four different individuals. However, when the claimant came to work there were only three individuals there including himself and one was a temp worker. The claimant found that he was required to do too much and in addition had to help the temp worker. The employer made no efforts to attempt to get more help and the claimant then left. At that time the claimant was told that he would be discharged. However, the claimant worked on March 14, 2006 and when the claimant came in on March 15, 2006 he was given two performance disciplinary actions, one dated March 14, 2006 indicating it was a discharge for walking off the job and another dated March 15, 2006 indicating a written warning for attendance. The claimant had also received a written warning as shown at Employer's Exhibit One on May 20, 2005 for an inappropriate exchange with a corporate nurse. At that time the claimant and the corporate nurse disagreed about the care of a patient. The claimant, having to deal with the patient everyday, was more familiar with the patient's care than was the corporate nurse.

The claimant was absent on March 7, 8, and 9, 2006 for personal illness, the same problem he suffered on March 10, 2006. The claimant had properly reported these absences. The claimant was asked to find a replacement but could not do so on such short notice. However, generally the employer finds replacements for individuals who are going to be absent and this is according to the employer's policy. There was a memo to employees dated March 2, 2006 indicating that employees were going to have to find their own replacements if they were absent. The claimant had other absences for personal illness but these were properly reported.

Pursuant to his claim for unemployment insurance benefits filed effective March 12, 2006, the claimant has received unemployment insurance benefits in the amount of $1,281.00 as follows: $9.00 for the benefit week ending March 18, 2006 (vacation pay $203.00) and $212.00 per week for six weeks from the benefit week ending March 25, 2006 to the benefit week ending April 29, 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 96.5-1 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 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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when he walked off the job on March 10, 2006. However, the employer gives as the date of the quit March 15, 2006. The claimant maintains that he was discharged on March 15, 2006 when he came into work and received two disciplines as shown at Employer's Exhibit One dated March 14, 2006 and March 15, 2006. The administrative law judge concludes that the employer has not met its burden of proof to demonstrate by a preponderance of the evidence that the claimant voluntarily left his employment. If the claimant had voluntarily left his employment on March 10, 2006, the claimant would not have worked on March 14, 2006 and come to work on March 15, 2006. The employer's witness testified that the claimant worked on March 14, 2006 because they needed him to work. Finally, one of the disciplines, dated March 14, 2006, given to the claimant on March 15, 2006, clearly indicates that the claimant was discharged. The administrative law judge also notes that that discipline was dated March 14, 2006 but the claimant worked that day but was not given that discipline until after he had worked his shift, gone home and come back for the next day's shift. Accordingly, the administrative law judge concludes that the claimant was discharged on March 15, 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.

In addition to his attendance, discussed below, the only other reason for the claimant's discharge was walking off the job on March 10, 2006. The administrative law judge in no way condones a worker walking off the job in the middle of his shift. However, on this occasion, the claimant credibly testified that he was ill and had a doctor's excuse to be absent but went to work anyway because he was asked to do so because the employer was short staffed. The employer's witness testified that the employer was not in fact short staffed but the administrative law judge finds this testimony not credible. Why would the employer request that the claimant come to work when he was ill unless the employer was short staffed. Further, the claimant was allowed to work on March 14, 2006 even though there was a discipline dated that date discharging the claimant. It appears to the administrative law judge that the employer was frequently short staffed. In any event, the claimant informed the employer that he would come to work if there was plenty of help for him. The claimant indicated that he was not able to do all the work himself. The employer assured the claimant that there was plenty of help, four workers. However, when the claimant arrived he discovered that there were only three workers and one of them was a temp worker. The shortage of workers required the claimant to do too much and in addition he had to help the temp worker. The employer made no efforts to attempt to get more help so the claimant left. The claimant's testimony was credible and forthright. The administrative law judge concludes that the claimant came to work ill because he was requested to do so and upon the assurance that there would be plenty of help for him and when he discovered otherwise he left. The administrative law judge concludes that the claimant's leaving in this situation was not a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor does it evince a willful or

wanton disregard of the employer's interests nor is it carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. Rather, the claimant's act here was ordinary negligence in an isolated instance and is not disqualifying misconduct. The administrative law judge notes that the claimant had received no warnings prior to his discharge other than one dated May 20, 2005, almost ten months before his discharge, and this only for an inappropriate exchange with the corporate nurse.

Concerning his attendance, there was evidence that the claimant was absent on March 7, 8, and 9, 2006. The claimant was absent for personal illness, suffering from the same condition that required him to walk off the job on March 10, 2006. These absences were properly reported. Even the employer's witness conceded that the claimant called in sick three days in a row but testified that his absences were different days. In any event, the claimant's absences here were for personal illness and properly reported and not excessive unexcused absenteeism. There was also evidence of other absences on the part of the claimant but again they were for personal illness and properly reported and are not excessive unexcused absenteeism. The claimant received no warnings for his attendance prior to his discharge. The claimant did receive two disciplines on the date of his discharge at least related to attendance but these occurred at the time that the claimant was discharged. The administrative law judge concludes that the claimant's absences and occasion when he walked off the job on March 10, 2006 were for personal illness and properly reported and are not excessive unexcused absenteeism and not disqualifying misconduct.

There is some evidence that the claimant failed to find his own replacement on the three days that he was absent for personal illness. However, the claimant credibly testified that the employer has a policy that provides that the employer will find the replacement in the event that an employee is absent. The claimant also credibly testified that no one had been written up for a failure to get his or her own replacement. The employer does not seem to contest this but the employer's witness testified that there was a memo circulated to employees on March 2, 2006 informing the employees that they had to get their own replacements. This occurred only three or four days before the claimant's absences. The administrative law judge understands that under a new policy it may be difficult for an employee to get a replacement or to remember that he had to get a replacement in view of the prior policy of the employer. The administrative law judge concludes that the claimant's failure to obtain a replacement on the days that he was absent is not disqualifying misconduct nor does it establish excessive unexcused absenteeism.

In summary, and for all the reasons set out above, 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. 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 $1,281.00 since separating from his employment on or about March 15, 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 5, 2006, reference 01, is affirmed. The claimant, Ronald S. Boxwell, 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