

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

NATHAN P SMITH  
310 THOMAS ST  
SIOUX RAPIDS IA 50585

TYSON FRESH MEATS INC  
c/o FRICK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-283

Appeal Number: 05A-UI-01299-JTT  
OC: 01/02/05 R: 01  
Claimant: Respondent (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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
871 IAC 24.32-7 – Excessive Unexcused Absences  
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Tyson filed a timely appeal from the January 27, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 22, 2005. Nathan Smith participated in the hearing. Tyson participated through Sarah Mendoza, Assistant Human Resources Manager, with witness Lynn Hall, Senior Security Officer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathan Smith was employed by Tyson as a part-time security officer from December 19, 2003 until

November 19, 2004, when Lynn Hall, Senior Security Officer, placed him on suspension and subsequently discharged him for excessive absenteeism.

The last absence that prompted Ms. Hall to discharge Mr. Smith was on November 14, 2004. On that date, Mr. Smith was a no-call/no-show for his shift. Though Mr. Smith was apparently dealing with issues of depression on this date, he did not share this information with the employer.

Tyson has an attendance policy that is specific to security officers. Under the attendance policy that applied to security officers at the Tyson plant, Mr. Smith was subject to being discharged upon his second unexcused absence within a 12-month period. Under the policy, if Mr. Smith knew he needed to be absent for a shift, due to illness or otherwise, he was expected to contact the Senior Security Manager at least two hours prior to the scheduled start of his shift. If the absence was due to illness and Mr. Smith failed to contact the employer two hours in advance of the shift, the absence was considered unexcused. Under the policy, two instances of tardiness equaled one absence. Though Mr. Smith had reviewed the policy as part of his training materials at the time of hire, he was not provided with a copy of the policy.

Mr. Smith's prior absences in 2004 were as follows: January 26, fifteen minutes late due to driving conditions; February 1, missed a shift because he misread his schedule, February 21, missed a shift due to bad driving conditions; August 13, absent due to illness and contacted the employer between 1:30 and 5:30 a.m. for a 7:00 a.m. shift; October 24, left work early due to illness; October 30, no-call/no-show due to problems at home; and October 31, ten minutes late for personal reasons.

On November 2, Ms. Hall issued a verbal warning to Mr. Smith, based on four absences and one instance of tardiness. After that point, Mr. Smith was fully aware that his job would be in jeopardy if he missed any more work due to an unexcused absence or tardy.

Mr. Smith established a claim for benefits that was effective January 2, 2005. Mr. Smith received benefits for the weeks the ended January 8 through March 12 in total amount of \$1,414.00.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Smith was discharged for misconduct in connection with his employment based on excessive unexcused absences.

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(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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Smith's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the employer must show that the absences were excessive and that the absences were unexcused. See 871 IAC 24.32-7. The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based a careful review of the evidence in the record, as set forth in the Findings of Fact, the administrative law judge concludes that Mr. Smith's absence on November 14 was unexcused. The administrative law judge concludes that Mr. Smith's absences on January 26, February 21, October 30, and October 31 were all due to matters of personal responsibility and were therefore unexcused absences. The administrative law judge concludes that Mr. Smith's absences on August 13 and October 24 were due to illness, properly reported to the employer, and, therefore, excused absences.

Mr. Smith had two no-call/no-show absences within an approximate two-week period. In addition, Mr. Smith was tardy to work during the same approximate two-week period. Prior to the last no-call/no-show, Mr. Smith was specifically warned that his job was in jeopardy because of his attendance issues. Mr. Smith was aware of the employer's attendance policy. In light of all of these factors, the administrative law judge concludes that Mr. Smith's unexcused absences were excessive and that Mr. Smith was discharged for misconduct. Accordingly, Mr. Smith is disqualified for benefits.

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.

Having concluded that Mr. Smith is disqualified for benefits, the \$1,414.00 in benefits that Mr. Smith has received constitutes an overpayment. Mr. Smith will have to repay that amount.

**DECISION:**

The representative's decision dated January 27, 2005, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant is overpaid benefits in the amount of \$1,414.00.

jt/sc