

**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**

**CASSIUS O CHRISTO
1528 – 6TH AVE
COUNCIL BLUFFS IA 51501**

**FBG SERVICE CORPORATION
C/O HOWARD JOHNSON ASSOCIATES
PO BOX 6007
OMAHA NE 68106**

**Appeal Number: 06A-UI-01098-S2T
OC: 01/01/06 R: 01
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

STATEMENT OF THE CASE:

Cassius Christo (claimant) appealed a representative's January 20, 2006 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he quit work with FBG Service Group (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 15, 2006. The claimant participated personally. The employer was represented by Dawn Fox, Employer's Representative, and participated by Tod Bender, Project Manager. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was re-hired on April 1, 2002, as a full-time custodian. The claimant received warnings on July 20 and October 28, 2005, for absences due to properly reported illnesses.

The claimant properly reported that he was ill and would not be able to work on December 9, 12, 13, 14, 15, 16, and 19, 2005. The claimant was in the emergency room at the hospital on December 12, 15, and 19, 2005. The claimant left messages with the secretary, but the employer did not receive the messages left on December 15, 16, and 19, 2006. On December 20, 2005, the claimant telephoned the employer to say he would not be in, because he was having transportation problems. The employer told the claimant he was terminated as of December 16, 2005.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the claimant's testimony to be more credible, because the employer had more difficulty remembering the dates and events of the claimant's employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons, the administrative law judge concludes he was 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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Three incidents of tardiness or absenteeism after a warning constitutes misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). The claimant had only one absence which was not due to illness. This final absence was properly reported. The claimant's absences due to properly reported illness shall not be considered misconduct, because they were not volitional. The claimant was discharged, but the employer has not provided sufficient evidence of misconduct. Benefits are allowed.

DECISION:

The representative's January 20, 2006 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible

bas/kjw