

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

MITCHELL R PADAVICH
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OTTUMWA IA 52501

THE DEXTER COMPANY
2211 W GRIMES
PO BOX 210
FAIRFIELD IA 52556-0210

Appeal Number: 04A-UI-06162-RT
OC: 05-09-04 R: 03
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:

The claimant, Mitchell R. Padavich, filed a timely appeal from an unemployment insurance decision dated May 27, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on June 28, 2004 with the claimant participating. Kathy Baker, Human Resources Secretary, participated in the hearing for the employer, The Dexter Company. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit 1 was admitted into evidence.

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 gang way laborer on the third shift from January 11, 1995 until he was discharged on May 4, 2004. The claimant was discharged for poor attendance. On April 29 and April 30, 2004, the claimant was absent because his minor child was ill. The minor child lives with the claimant. These absences were properly reported. The claimant was not even scheduled to work those two days but called in nevertheless to be safe because he knew he was in some difficulty regarding his attendance. On April 2, 2004, the claimant left work early 3.1 hours because he hurt his back at work. The claimant was absent other days but obtained a doctor's slip later in regards to this occasion when he left work early. The claimant was also absent on March 8, 2004 because of back pain and this was properly reported to the employer. On March 6, 2004, the claimant had to leave work early 3.6 hours to get his son because his babysitter had an emergency. The employer was aware of this and gave permission for the claimant to leave work early. On February 4, 2004, the claimant was absent and did not properly report this absence. The claimant did not know why he was absent on that occasion. On February 3, the claimant was absent and he properly reported this absence. He did not know why he was absent on that occasion but the claimant was having family problems during this period of time. The claimant left work early 8.7 hours on January 23, 2004 because of personal illness and he had permission to do so. The claimant was also absent on January 13, January 14, January 15, and January 16, 2004 because he hurt his ribs at work. The claimant had a doctor's excuse for these absences and all were properly reported. On January 6, 2004, the claimant was tardy two-tenths of an hour and he did not properly report his tardy. The claimant did not know why he was tardy on that occasion. The claimant was also tardy on January 3, 2004 but properly reported this tardy. The claimant did not know why he was tardy on that occasion. On January 2, 2004, the claimant was absent because of personal illness and this was properly reported to the employer. The claimant received several warnings both written and oral as shown at Employer's Exhibit 1 as follows: a written warning on April 8, 2004; a verbal warning on April 8, 2004; a written warning on March 11, 2004; a written warning on February 5, 2004; a verbal warning on February 5, 2004; and a written warning on October 15, 2003.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It 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, (7) provide:

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 administrative law judge concludes that the claimant was discharged on May 4, 2004. 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. Although it is a close question, 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.

The claimant's absences and tardies and occasions when he left work early are set out in the findings of facts. With four possible exceptions, the claimant's absences, tardies, and occasions when he left work early were due to personal illness or injury or the illness of his minor child and all were properly reported. These absences are not excessive unexcused absenteeism. On February 4, 2004, the claimant was absent without properly reporting his absence. The claimant was absent the day before February 3, 2004 but did properly report this absence. The claimant was not sure why he was absent on those two days but credibly testified that he was having significant family problems and was probably absent for those reasons. The administrative law judge notes that these two absences were three months

before the claimant's discharge. The administrative law judge concludes that these two absences were for reasonable cause but one was not properly reported. On January 6, 2004, the claimant was tardy two-tenths of an hour and this was not properly reported. The claimant does not remember why he was tardy. The administrative law judge concludes that this tardy was not for reasonable cause and not properly reported. The claimant was also tardy on January 3, 2004 2.3 hours and this was properly reported. The claimant could not remember why but the administrative law judge notes that just the day before the claimant was absent for personal illness so this tardy was probably for personal illness. The administrative law judge specifically notes that the claimant properly reported this tardy.

Accordingly, the administrative law judge concludes that the claimant had one tardy on January 6, 2004, which is not for reasonable cause and not properly reported and one absence on February 4, 2004, which was not properly reported. These two occasions do not establish excessive unexcused absenteeism. Generally, 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 two. Accordingly, although it is a close question, the administrative law judge concludes that the claimant's absences, tardies, and occasions when he left work early were not excessive unexcused absenteeism and not disqualifying misconduct. The administrative law judge notes that the claimant received numerous verbal and oral warnings as set out at Employer's Exhibit 1 and contained in the findings of fact. However, the administrative law judge notes that five occurred after the claimant's last questionable absence as noted above on February 4, 2004. All of the claimant's absences and tardies and occasions when he left work early thereafter were clearly for reasonable cause or personal illness and properly reported.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for excessive unexcused absenteeism and 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 May 27, 2004, reference 01, is reversed. The claimant, Mitchell R. Padavich, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

tjc/kjf