

**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**

**MONIER M ELNOUR  
2928 – 48<sup>TH</sup> ST  
DES MOINES IA 50310**

**MOSAIC  
C/O JOHNSON & ASSOCIATES  
NOW TALX UC EXPRESS  
PO BOX 6007  
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-08414-RT  
OC: 07-11-04 R: 02  
Claimant: Appellant (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, 4<sup>th</sup> 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

STATEMENT OF THE CASE:

The claimant, Monier M. Elnour, filed a timely appeal from an unemployment insurance decision dated August 4, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on August 25, 2004, with the claimant participating. David Wilcox, District Support Manager; Kelly Crane, Direct Support Coordinator; and Marsha Edgington, Program Service Director, participated in the hearing for the employer, Mosaic. Nancy Seel sat in on the hearing for the employer. The employer was represented by Lynn Corbeil, of Johnson & Associates, now TALX UC eXpress. Employer's Exhibits 1, 2, and 3 were admitted into evidence. When it became apparent to the administrative law judge at the beginning of the hearing that the claimant was not a native English speaker, the administrative law judge asked the claimant if he needed an interpreter and the claimant denied such need and refused an interpreter.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 through 3, the administrative law judge finds: The claimant was employed by the employer as a full-time direct support associate from May 30, 2002 until he was discharged on July 15, 2004. The claimant was discharged for poor attendance and not following the employer's policies, including not properly reporting his absences. On July 9, 2004, the claimant was twice called by the employer's witness, David Wilcox, Direct Support Manager, and asked if he would work the next day, July 10, 2004, which would have ordinarily been the claimant's day off. The claimant led Mr. Wilcox to believe that he would cover the shift the next day. However, the claimant did not go to work the next day, July 10, 2004, and did not properly notify anyone that he was not coming to work. He did call the employer in the morning on July 10, 2004, to inquire who was working, but said nothing about his absence or not being at work and did not talk to a supervisor. The employer has a policy in its handbook concerning attendance that an employee who is going to be absent or tardy must notify the supervisor at least two hours prior to the scheduled work time, and this notification must be direct to the supervisor. This policy appears at Employer's Exhibit 3. The claimant received a copy of this policy and signed an acknowledgement, as shown at Employer's Exhibit 3, and further, was aware of the policy.

On April 21, 2004, the claimant was absent. He gave no reason for his absence but obtained a coworker to work for him. However, this absence was not properly reported to the employer. Instead of talking directly to his supervisor, the claimant just left a telephone message. On October 25, 2003, the claimant was tardy five minutes without giving a reason, and this was not properly reported to the employer. The claimant left work early on October 16, 2003, without permission and did not leave a reason why. On October 5, 2003, the claimant was absent for illness, but did not call in a timely fashion according to the employer's policy. The claimant had other absences or tardies or occasions when he left work early for personal illness or a family emergency, and these were properly reported to the employer. The claimant received a number of written warnings, as set out in Employer's Exhibit 1 as follows: February 5, 2003; February 19, 2003; June 10, 2003; October 17, 2003; October 29, 2003; and November 25, 2003. In addition, the claimant was suspended on February 3, 2004 for slapping a coworker.

On July 10, 2004, the employer attempted to call the claimant without success. The employer left a message for the claimant to call, but he never returned the call. Finally, in response to telephone messages, the claimant called and spoke to the employer's witness, Kelly Crane, Direct Support Coordinator. Ms. Crane asked the claimant about his absence on July 10, and asked the claimant to come in, but the claimant refused. She then passed the phone to the employer's third witness, Marsha Edgington, Program Services Director. At that point then, the claimant did come in later to talk to Ms. Edgington and at one point during the conversation, conceded that he had indicated to Mr. Wilcox that he would cover the shift, although denied it later. Ms. Edgington suspended the claimant for investigation of these matters and then discharged the claimant on July 15, 2004.

#### 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.

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 parties testified and the administrative law judge concludes that the claimant was discharged on July 15, 2004, after being suspended on July 12, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a suspension or discharge, the claimant must have been suspended or 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. IDJS, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including excessive unexcused absenteeism. The employer's witnesses credibly testified to a number of absences by the claimant. The most recent of which occurred on July 10, 2004, when the claimant agreed to take a shift on that day but then later

did not show up to cover the shift. The claimant denies agreeing to take the shift, but the claimant's denial is not credible. David Wilcox, Direct Support Manager, credibly testified that he called the claimant twice on July 9, 2004 about having the claimant cover the shift the next day. Mr. Wilcox credibly testified that the claimant said that if he could not find anybody else to call him and Mr. Wilcox did not, so he called the claimant back on July 9, 2004, and the claimant said he would cover the shift. The claimant's denials, again, are not credible. He equivocated in the hearing as to whether he would cover the shift, at one point stating that he told Mr. Wilcox he would not and then later saying that he told Mr. Wilcox he might if he was called in the morning. There is also evidence that he told another employer's witness, Marsha Edgington, Program Serviced Director, that he had told Mr. Wilcox that he would cover the shift. The claimant even concedes that he called the employer in the morning of July 10, 2004, and asked who was working. It appears to the administrative law judge that the claimant actually agreed to cover the shift and then decided not to and called the employer to see if there were some people working and, when there were, he decided not to attend his shift. The claimant did not call and speak to his supervisor about being absent on that shift, as per the employer's policy as set out in the Findings of Fact.

In addition to the absence, on July 9, 2004, the claimant was also absent on April 21, 2004 and he failed to properly report this absence. He obtained a coworker to work for him, but did not inform the employer properly by a direct call to the supervisor, as per the employer's policy. The claimant was also tardy on October 25, 2003, without giving a reason and not properly reporting the tardy. The claimant also left work on October 16, 2003, without permission and not informing the employer. Finally, the claimant was absent for personal illness on October 5, 2003, but did not timely call the employer within the two hours prior to the claimant's shift, as per the employer's policy. The claimant received numerous written warnings, as shown at Employer's Exhibit 1, for his attendance and for failing to comply with the employer's policies, including calling in his absences. It is clear from these warnings that the claimant was put on notice that he needed to properly attend his work shifts and, when absent, to properly inform the employer, as well as put on clear notice to follow the employer's rules and policies. Accordingly, the administrative law judge concludes that the claimant's absences and tardies, as set out above, were not for reasonable cause and not properly reported and, in view of the warnings the claimant received, are excessive unexcused absenteeism and disqualifying misconduct. The administrative law judge notes that when the claimant finally called the employer on July 12, 2004, in response to messages left by the employer since July 10, 2004, that he refused to come in when initially asked to do so, and had to be asked again by Ms. Edgington.

The administrative law judge also concludes that the "last straw doctrine" as enunciated in Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983) applies here. That doctrine provides that a relatively minor infraction, when viewed in the light of prior infractions may evidence sufficient disregard for the employer's interest to constitute misconduct. The fact that the prior acts were remote in time from the one for which the employee was discharged were different in nature does not preclude a finding of misconduct. The warnings the claimant received are filled with numerous other violations of the employer's policies. There is also evidence that the claimant was suspended on February 3, 2004, for slapping a coworker. The claimant denies slapping the coworker, but the administrative law judge concludes that at least the claimant was aggressive to the coworker. The claimant also violated other employer's policies, including and especially, the employer's attendance policy. The administrative law judge concludes that even though some of these violations of policy were in 2003, they are not so remote in time as to be irrelevant. Further, the claimant's violations seem to be all related to failure to comply with the employer's policies. Accordingly,

the administrative law judge concludes that claimant's violation of the employer's policy under the "last straw doctrine" is also disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

**DECISION:**

The representative's decision dated August 4, 2004, reference 01, is affirmed. The claimant, Monier M. Elnour, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

b/kjf