**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

**Appeal Number: 05A-UI-04739-RT**
**OC: 04/03/05 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.

**JOEL A WITT**
**219 – 2ND ST**
**PO BOX 171**
**ASHTON IA 51232**

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

______________________________
(Administrative Law Judge)

______________________________
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The claimant, Joel A. Witt, filed a timely appeal from an unemployment insurance decision dated April 22, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held May 24, 2005, with the claimant participating. Brad Huisenga, Human Resources Manager, participated in the hearing for the employer. Exopack LLC. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 9:00 a.m., the employer had not called in or provided a telephone number where witnesses could be reached for the hearing. The administrative law judge reached the claimant and began the hearing when the record was opened at 9:01 a.m. The employer called the Appeals Section at 9:05 a.m., and left a number which the administrative law judge called at 9:06 a.m., and the employer participated in the balance of the hearing.

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 press helper from July 15, 2003 until he was discharged on March 21, 2005, for poor attendance. The claimant was absent from March 14, 2005 to March 18, 2005, for a family emergency. His mother was ill and hospitalized. The claimant lives in Ashton, Iowa, and his mother lives in Paulina, about 40 to 45 miles away. Early in the week, the claimant was the only family member who was able to tend to his mother. Towards the end of that week the claimant might have been able to return to work, but he was worried about his mother. She was first hospitalized in Orange City, and then transferred to Sioux City. On March 14, 15, 16, 2005, the claimant properly reported his absences to the employer by calling the day-shift supervisor, LeeRoy, between 2:00 p.m. and 3:00 p.m., and the claimant's shift did not begin until 4:00 p.m. The employer has a rule that requires an employee to call and notify the employer of an absence one hour before the employee's shift. The claimant did not notify the employer, or call the employer, on March 17 and 18, 2005. The claimant attempted to call the employer, but was unable to get through on those two days. However, the employer experienced no telephone problems with its telephones. However, there was bad weather at that time. The claimant finally called and reached his supervisor between 9:00 p.m. and 9:30 p.m. on March 18, 2005. The claimant was worried about his job and asked if he had a job. His supervisor told the claimant to call back on Monday, March 21, 2005, and talk to the employer's witness, Brad Huisenga, Human Resources Manager. The claimant did so, and Mr. Huisenga told the claimant that he (Mr. Huisenga) would need to contact the corporate offices. Mr. Huisenga did so, and then called the claimant back on the same day, March 21, 2005, and told the claimant that he was discharged.

The employer was aware of the conditions of the claimant's mother and had offered the claimant Family and Medical Leave Act time off and gave the claimant the paperwork required. The claimant did get the paperwork filled out, but did not have an opportunity to turn it in before his mother was hospitalized, and before he was discharged. The claimant had prior absences from February 28, 2005, to March 9, 2005, for personal illness involving the flu and bacterial infection. He was released to return to work on March 10, 2005. The claimant properly reported all of these absences. In this situation, the claimant did not have to call in on a daily basis if he informed the employer of future absences, and the claimant did so appropriately. The claimant provided the necessary medical information to the employer. Part of the Family and Medical Leave Act offered by the employer included the claimant's own medical conditions. The claimant had a few other absences for personal illness, but Mr. Huisenga had no specific dates, nor did the claimant. All of these absences were properly reported. The claimant had no tardies. The claimant received a number of warnings for his attendance, but all were in 2004 as follows: December 15, 2004, written warning; September 16, 2004, written warning; April 8, 2004; written warning; February 12, 2004, written warning; and a meeting with his supervisor and a written warning in early 2004, but no date was provided.

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 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 parties agree, and the administrative law judge concludes, that the claimant was discharged on March 21, 2005. 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, namely excessive unexcused absenteeism. The testimony of the two witnesses was remarkably similar. The claimant was absent for an extended period of time in late February and early March 2005 for personal illness, and then in the middle of March 2005, for the illness of his mother, as set out in the findings of fact. The employer does not appear to contest either the fact that the claimant was ill for his absences nor that the claimant's mother was ill for those absences. The issue appears to be the proper reporting of the claimant's absences for March 17 and 18, 2005. The employer concedes that the other absences were properly reported. The claimant testified that he was not able to contact the employer on March 17 and 18, 2005, although he attempted to do so. The claimant testified that he could not get through on his telephone. The employer's witness, Brad Huisenga, Human Resources Manager, credibly testified that the employer experienced no telephone problems during that time, but did concede that there was a weather problem. First, the administrative law judge concludes based upon evidence here, that the claimant at least attempted to properly report these absences. Accordingly, the administrative law judge is constrained to conclude that the claimant's absences were for personal illness or reasonable cause and properly reported, or a failure to properly report was justified, and therefore, these absences are not excessive unexcused absenteeism.

Mr. Huisenga testified that the claimant was offered Family and Medical Leave Act leave, both for his personal illness and for that of his family, but the claimant did not return the paperwork. The claimant credibly testified that he did receive the paperwork and he filled it out properly, but did not return it because by the time he had completed the paperwork his mother was hospitalized and then he was discharged. This evidence does not establish that the claimant's absences were not excessive unexcused absenteeism, but on the contrary, seem to support that conclusion. The administrative law judge notes that the claimant had a few other absences for personal illness, but that these were properly reported. There were no tardies. The claimant's past attendance seems acceptable, and it appears to the administrative law judge that the claimant simply had a string of unfortunate circumstances in February and March 2005 beyond his control. It is true that the claimant received a number of warnings, but they were all in 2004, and in any event, the administrative law judge concludes above that the claimant's absences were not excessive unexcused absenteeism.

In summary, and for all reasons set out above, the administrative law judge concludes that the claimant's absences were for reasonable cause or personal illness and properly reported, or a failure to properly report was justified, and therefore were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, 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 for 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 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.

DECISION:

The representative's decision of April 22, 2005, reference 01, is reversed. The claimant, Joel A. Witt, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged, but not for disqualifying misconduct.

kjw/pjs