

**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**

**JOHN W HENDRICKSEN JR
1254 – 120TH ST
JOY IL 61260-8524**

**TEAM STAFFING SOLUTIONS INC
116 HARRISON ST
MUSCATINE IA 52761**

**JOHN W HENDRICKSEN JR
1254 – 120TH ST
WAVERLY IA 50677**

**Appeal Number: 06A-UI-02625-RT
OC: 02/05/06 R: 04
Claimant: Respondent (1-R)**

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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Team Staffing Solutions, Inc, filed a timely appeal from an unemployment insurance decision dated February 20, 2006, reference 01, allowing unemployment insurance benefits to the claimant, John W. Hendricksen, Jr. After due notice was issued, a telephone hearing was held on March 23, 2006, with the claimant participating. Bill Ramsey, Claims Administrator, participated in the hearing for the employer. Mary Kirchner, Account Manager, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 from July 21, 2004, until he separated from his employment on July 20, 2005. The employer is a temporary employment agency and at all material times hereto the claimant was assigned to Menasha Packaging. His assignment began July 21, 2004 and was a temp-to-hire assignment with no ending date. The claimant did not satisfactorily complete that assignment. He was told not to return to the assignment on July 20, 2005 because of his attendance.

The claimant injured his back causing damage to the sciatic nerve. Whether this was caused at work is uncertain but the claimant never told the employer or Menasha Packaging that his back problems were caused by his employment. Because of these back problems the claimant was absent numerous times. The claimant was absent on July 15, 18, 19, and 20, 2005 because of his back problems. For at least three of these days the claimant had appointments with his chiropractor but on all the days the claimant did not feel well enough to go to work. The claimant was also absent for a week from May 30, 2005 to June 3, 2005 either because of his back problems or because of vacation. The claimant was also absent on February 7, 2005 because of his back problem. The claimant was absent on January 6, 2005 because of personal illness. The claimant properly reported all of these absences to the employer. The employer has a rule or policy that requires that an employee who is going to be absent or tardy notify both the employer and the assignee, in this case, Menasha Packaging, before the employee's shift begins. The claimant always properly reported these absences. The claimant received no warnings or disciplines for his attendance. The claimant provided no releases to return to work to his employer or any other doctor's statement to the employer.

The claimant's back condition continued to worsen since his first absence on February 7, 2005. The claimant did not consult a physician but rather consulted a chiropractor ten times. The chiropractor provided the claimant no relief so the claimant then went to a community health center but this occurred after his separation. The claimant testified that his back was better now and he was released by a chiropractor to go back to work on July 20, 2005. Pursuant to his claim for unemployment insurance benefits filed effective February 5, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,080.00 as follows: \$216.00 per week for five weeks from the benefit week ending February 11, 2006 to the benefit week ending March 11, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not, at least insofar as his separation from the employer herein is concerned.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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 first issue to be resolved is the character of the separation. The parties really do not attempt to characterize the separation in any particular fashion. The administrative law judge

concludes that the claimant was effectively discharged on July 20, 2005 when he was absent because of his back problems and was told by the employer when he reported his absence that he was not to return to work at Menasha Packaging, where the claimant was assigned. 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 only possible reason for the claimant's discharge was his absences. The claimant's absences are set out in the Findings of Fact. The claimant testified that he was absent on all of those occasions because of a back problem involving the sciatic nerve. Although the claimant's testimony was not particularly credible, there is no evidence to the contrary. The claimant properly reported all of these absences. Accordingly, the administrative law judge is constrained to conclude that the claimant's absences were all for personal illness or injury and all properly reported and are not excessive unexcused absenteeism. The administrative law judge specifically notes that the claimant never received any warnings or disciplines for his attendance. Some of the absences were for chiropractic appointments but the claimant testified that he was not well enough to go to work either before or after the appointment.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not 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 from 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 that 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.

There was significant evidence at the hearing that the claimant may have a continuing back problem. The claimant testified that his back continued to worsen after February of 2005 ultimately resulting in the absences as noted above. The claimant also testified that he did not file for unemployment insurance benefits immediately after being separated from his employer because he was receiving medical attention from Medicaid. The claimant also testified that he saw a chiropractor ten times and got no relief so he consulted the physician. The claimant consulted the physician after his separation. The claimant testified that he was released to return to work by his chiropractor on July 20, 2005 but this was the claimant's date of separation. This is not credible because the claimant testified that he consulted the physician after his separation. The administrative law judge believes that the claimant may have a continuing back problem. Accordingly, there is an issue as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is and was not able to work. This issue was not set out on the notice of appeal and the administrative law judge does not now have jurisdiction to decide that issue. This matter must be remanded to Claims

for investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3).

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,080.00 since separating from the employer herein on or about July 20, 2005 and filing for such benefits effective February 5, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits, at least, insofar as his separation from the employer herein is concerned, and therefore he is not overpaid any such benefits as a result of his separation.

DECISION:

The representative's decision of February 20, 2006, reference 01, is affirmed. The claimant, John W. Hendricksen, Jr., is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. In order to determine whether the claimant is otherwise eligible to receive such benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is, and was, at relevant times, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3). As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

REMAND:

This matter is remanded to Claims for investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits, because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3).

cs/s