

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

WYATT L MEYER
218 SE EASTLAWN DR
ANKENY IA 50021

MICHAEL HAMMER ELECTRICAL
SERVICES INC
275 SOUTHVIEW DR
WAUKEE IA 50263

Appeal Number: 05A-UI-11907-RT
OC: 10-23-05 R: 02
Claimant: Respondent (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
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Michael Hammer Electrical Services, Inc., filed a timely appeal from an unemployment insurance decision dated November 14, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Wyatt L. Meyer. After due notice was issued, a telephone hearing was held on December 21, 2005, with the claimant not participating. The claimant had not called in a telephone number either before the hearing or during the hearing, where he could be reached for the hearing, as instructed in the Notice of Appeal. However, a telephone number had been called in for a witness Kristen Davis. When the administrative law judge called that number he spoke to Ms. Davis and Ms. Davis said that

was also the number for the claimant but he was running errands and was not there. The administrative law judge explained that this was the time for a hearing that had already been rescheduled once by the claimant. Ms. Davis informed the administrative law judge that she did not want to participate in the hearing on behalf of the claimant. The administrative law judge explained to Ms. Davis that he was going to go ahead and proceed with the hearing and if the claimant wanted to participate he would need to call before the hearing was over and the record was closed. The administrative law judge provided both a local number and an 800 number for the claimant to use. The administrative law judge began the hearing which ended when the record was closed at 9:24 a.m. and the claimant had not called by that time. Michael Hammer, President, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department of unemployment insurance records for the claimant. A hearing had initially been scheduled in this matter for December 8, 2005 at 9:00 a.m. but rescheduled at the request of Kristen Davis who had called the administrative law judge. It was rescheduled because Ms. Davis informed the administrative law judge that the claimant was out of town with a job interview and he was not going to be in town for the hearing. At that time Ms. Davis informed the administrative law judge that the claimant was not in jail then but had been in jail one day, November 21, 2005.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 electrical apprentice from November 29, 2004 until he was discharged on September 29, 2005 for poor attendance. The employer has a policy in its company policies/rules as shown at Employer's Exhibit One requiring that an employee telephone the office or the supervisor at least one hour before the employee's shift is to start if that employee is going to be absent or tardy and further requires that the employee not leave the job site without first contacting the office or supervisor. On September 29, 2005, the claimant called the employer at 12:30 p.m. and informed the employer that he was going to be absent for illness. The claimant's shift began at 7:00 a.m. On September 16, 2005, the claimant showed up for work on time but was scheduled to meet his supervisor seven miles away. However the claimant was two and a half hours late in meeting his supervisor. The claimant stated that he had car problems but he did not bother to call his supervisor to say that he was going to be late and, further, when he showed up two and a half hours late, he was driving his car. On September 21, 2005, the claimant was absent. He called the employer at 10:30 a.m. and indicated that he was going to be absent for illness. The claimant also had three other tardies which were not properly reported to the employer. For all of these tardies and absences the claimant received verbal reprimands. These absences and tardies are confirmed by witness statements at Employer's Exhibit Two. The claimant also left the work site without notifying the employer as per the employer's policies and received a reprimand for this.

The employer's witness, Michael Hammer, President, testified that he had no knowledge as to whether the claimant had placed any restrictions on his physical ability or training ability to perform work but that he had heard that the claimant was in jail when another employee under oath in another unemployment insurance hearing testified that the claimant had been in jail. Mr. Hammer had no knowledge as to whether the claimant was seeking work. Pursuant to his claim for unemployment insurance benefits filed effective October 23, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,650.00 as follows: \$275.00 per week for six weeks from benefit week ending October 29, 2005 to benefit week ending December 3, 2005. For benefit weeks ending December 10 and 17, 2005 the claimant is

shown as disqualified for not being able and available for work because he failed to report as directed by a decision dated December 14, 2005, reference 03.

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.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he was not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for those reasons.
3. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 employer's witness, Michael Hammer, President, credibly testified, and the administrative law judge concludes, that the claimant was discharged on September 29, 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). 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. Mr. Hammer credibly testified that the claimant was absent on two occasions, September 21 and 29, 2005 without timely notifying the employer according to the employer's policies as shown at Employer's Exhibit One and as set out in the Findings of Fact. Mr. Hammer also credibly testified that the claimant was tardy on September 16, 2005 to meet his supervisor who was only seven miles away and the claimant was two and a half hours tardy and did not notify the supervisor. Mr. Hammer also credibly testified that the claimant was tardy on three other occasions when he did not properly notify the employer. Mr. Hammer further testified that the claimant left the work site without notifying the office or the supervisor as required by the employer's rules at Employer's Exhibit One. These absences and tardies are confirmed by witness statements at Employer's Exhibit Two. Finally, Mr. Hammer credibly testified that the claimant had received five verbal reprimands for the tardies and absences prior to September 29, 2005 and then also a verbal reprimand for leaving the work site.

On the record here, the administrative law judge is constrained to conclude that the claimant's absences and tardies, even if for reasonable cause or personal illness, were not properly reported and are excessive unexcused absenteeism and disqualifying misconduct. Therefore, 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.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or as otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W. 2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he was and is, at relevant times, able, available, and earnestly and actively seeking work or that he is otherwise excused from those requirements. There is no evidence that the claimant is either temporarily unemployed or partially unemployed as defined by Iowa Code section 96.19 (38) (b) and (c) so as to excuse the claimant from the requirements that he be available for work or earnestly and actively seeking work. There is also no evidence that the claimant is in fact able, available, and earnestly and actively seeking work. Mr. Hammer had no evidence as to whether the claimant was able to work and/or earnestly and actively seeking work but had heard in an unemployment insurance hearing by a witness under oath that the claimant had been in jail. This was confirmed to the administrative law judge by Kristen Davis when Ms. Davis asked for the continuance on behalf of the claimant, at least confirmed to the extent the claimant was in jail one day. The administrative law judge notes that the claimant is presently ineligible to receive unemployment insurance benefits because he failed to report as directed to Iowa Workforce Development by a decision dated December 14, 2005, reference 03. Accordingly, without some evidence from the claimant, the administrative law judge is constrained to conclude the claimant is not able, available, or earnestly and actively seeking work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits and demonstrates that he is able, available, and earnestly and actively seeking work.

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 \$1,650.00 since separating from the employer herein on or about September 29, 2005 and filing for such benefits effective October 23, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of November 14, 2005, reference 02, is reversed. The claimant, Wyatt L. Meyer, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The

claimant is also ineligible to receive unemployment insurance benefits because he is and was, at relevant times, not able, available, and earnestly and actively seeking work. The claimant is overpaid unemployment insurance benefits in the amount of \$1,650.00.

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