

**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**

**CHARLES A REGAN  
141 SEVENTH AVE N  
FORT DODGE IA 50501**

**ELECTROLUX HOME PRODUCTS INC  
DBA FRIGIDAIRE  
c/o SHEAKLEY/UNISERVICE INC  
PO BOX 1160  
COLUMBUS OH 43216-1160**

**Appeal Number: 04A-UI-01052-RT  
OC: 12-28-03 R: 01  
Claimant: Respondent (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.

---

(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 employer, Electrolux Home Products, Inc., doing business as Frigidaire, filed a timely appeal from an unemployment insurance decision dated January 23, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Charles A. Regan. After due notice was issued, a telephone hearing was held on February 23, 2004 with the claimant participating. Casey Sciorrotta, Labor Relations Manager, participated in the hearing for the employer. Employer's Exhibit 1 was admitted into evidence. 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, including Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time specialist II forklift driver from May 5, 1999 until he was discharged on December 15, 2003 for poor attendance. On December 9, 2003, the claimant was absent. The claimant first believed he was going to be late because school was out because of bad weather and he had to watch his children for a time. He called the employer before 2:00 p.m. in a timely fashion to inform them of the tardy. The claimant then went to work but wrecked his truck and was unable to go to work at all that day. He called the employer at 4:00 p.m. about his absence. The claimant wrecked his truck because of the bad weather. The claimant was then discharged for this absence. The employer has a rule that requires that an employee who is going to be absent or tardy call the employer and notify them of the absence or tardy prior to the start of the employee's shift. The claimant's shift started at 3:00 p.m.

On October 14 and October 15, 2003, the claimant was sick with the flu. He properly reported at least his absence on October 14, 2003. On September 26, 2003, the claimant was absent because he simply took his birthday off. He did properly report this absence as personal business. On September 16, 2003, the claimant was tardy. However, since this was the first tardy in 90 days for the claimant, the employer did not assign any points. The claimant could not remember why he was tardy. On March 4, 2003, the claimant was absent because of a medical disorder of his son and he properly reported this absence. The claimant received a written warning on March 16, 2000 for his absences and then a final notice on April 11, 2000 but received no other warnings until his discharge. There were no other reasons for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective December 28, 2003, the claimant has received unemployment insurance benefits in the amount of \$2,254.00 as follows: \$322.00 per week for seven weeks from benefit week ending January 3, 2004 to benefit week ending February 14, 2004.

#### 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.

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) 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).

(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.

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 claimant's absences are set out in the findings of fact. The administrative law judge concludes that the claimant's absence on December 9, 2003 was for reasonable cause and properly reported. The claimant credibly testified that he thought he was going to be late and timely called the employer that he was going to be late because his children were out of school because of bad weather. Then, on the way to work, the claimant had a wreck because of the bad weather and could not make it to work and finally called the employer about this at 4:00 p.m. Although this call was late according to the employer's policy, the administrative law judge concludes that he was justified in making such a late call. The administrative law judge concludes further that the claimant's absences on October 14 and October 15, 2003 were for personal illness and were properly reported. The employer testified that one was properly reported and the other one was not. The claimant testified that he thought he had called in both days. Since the two days were consecutive, the administrative law judge concludes that the employer should have known that the claimant was going to be absent for the second day

because of the illness he had the first day. The claimant was absent on September 26, 2003 simply because he wanted his birthday off. He did properly report this absence but the administrative law judge, nevertheless, concludes that this absence was not for reasonable cause or personal illness. The claimant had a tardy on September 16, 2003 but it seems to be excused by the employer. Further, there is no evidence that the claimant was not justifiably tardy on that day. The administrative law judge concludes that there is not a preponderance of the evidence that this tardy was not for reasonable cause or personal illness. On March 4, 2003, the claimant was absent because of a medical disorder of his son and this was properly reported and the administrative law judge concludes that this absence was for reasonable cause and properly reported.

Accordingly, the administrative law judge concludes that the claimant had only one absence that was not for reasonable cause and/or not properly reported and this was September 26, 2003. Generally, it requires three unexcused absences or tardies to establish excessive unexcused absenteeism. See for example, Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here the claimant only had one. The administrative law judge also notes that the claimant did receive two written warnings but they were over three years prior to the claimant's discharge.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that claimant's absences and tardies 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.

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 \$2,254.00 since separating from the employer herein on or about December 15, 2003 and filing for such benefits effective December 28, 2003. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 23, 2004, reference 01, is affirmed. The claimant, Charles A. Regan, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

tjc/b