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

BYRON L FARRINGTON
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TARGET CORPORATION
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Appeal Number: 05A-UI-11728-RT
OC: 10-16-05 R: 03
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, 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 96.5-1 – Voluntary Quitting
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, Target Corporation, filed a timely appeal from an unemployment insurance decision dated November 10, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Byron L. Farrington. After due notice was issued, a telephone hearing was held on December 19, 2005, with the claimant participating. Bridget Morris, Store Team Leader, and Katie Hubbell, Executive Team Leader/Human Resources, participated in the hearing for the employer. The employer was represented by John Swanson, Attorney at Law. Employer's Exhibits One and Two and Claimant's Exhibits A and B were admitted into evidence. The

administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. The hearing in this matter had initially been scheduled for December 5, 2005 at 1:00 p.m. and rescheduled at the claimant's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two and Claimant's Exhibits A and B, the administrative law judge finds: The claimant was employed by the employer as a permanent team leader from February 13, 2005 until he separated from his employment on June 30, 2005. From November 13, 2004 to February 13, 2005, the claimant had been a temporary employee of the employer. On or about March 12, 2005, the claimant suffered a rib injury which was related to his employment. He was off work for a period of time. One of his physicians, Dr. Pollack, to whom the claimant consulted for pain management, released the claimant to return to work May 23, 2005 as shown at Employer's Exhibit Two. The claimant had filed a worker's compensation claim and the employer's attorney had also received information from the worker's compensation carrier that the claimant had been released on May 23, 2005. However, the claimant did not return to work at that time. When the claimant did not return to work he was sent a letter dated May 26, 2005 as shown at Employer's Exhibit One stating that his leave had been scheduled to begin on May 17, 2005 with an anticipated return date of June 28, 2005. Accompanying that letter was a physician's statement that the employer requested the claimant to have completed and returned to the employer. This was sent to the last address the employer had for the claimant. The claimant never received that letter.

The claimant was released to return to work by his primary physician, Dr. Holcomb as shown at Claimant's Exhibit A. The second page of Claimant's Exhibit A which is missing clearly indicates that the claimant was released to return to work on June 30, 2005. On that day the claimant went to the employer and gave the second page of Claimant's Exhibit A showing the release to return to work effective June 30, 2005, to a male in the human resources office. That individual told the claimant that he was still on a leave and had to have a release to return to work and further told the claimant that the employer had no work. The claimant was released to return to work by Dr. Holcomb to full duty but with some restrictions to minor lifting which was not a problem to the claimant and his position as team lead. Dr. Holcomb was the physician who referred the claimant to Dr. Pollack for pain management. Claimant's Exhibit B demonstrates the extent of the claimant's physical difficulties including the rib injury and his consultations with physicians and their statements. Claimant's Exhibit B also demonstrates that the claimant was attending rehabilitation at least through June 20, 2005.

The claimant did take a new job which began August 1 of 2005 with United Farm Supply which ended during the first week of October of 2005. The claimant's employment is confirmed in Claimant's Exhibit A. The claimant had applied for this position in September of 2004 and was contacted about the position in June of 2004 before the claimant had contacted the employer to return to work. Since filing for unemployment insurance benefits effective October 16, 2005, the claimant has placed no physical restrictions or training restrictions on his ability to work and further has placed no time or day restrictions on his availability for work. Since that time the claimant has been earnestly and actively seeking work by making two in-person job contacts each week. Pursuant to his claim for unemployment insurance benefits filed effective October 16, 2005, the claimant has received unemployment insurance benefits in the amount of $2,682.00 as follows: $298.00 per week for nine weeks from benefit week ending October 22, 2005 to benefit week ending December 17, 2005.

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 ineligible to receive unemployment insurance benefits because, at relevant times, he was not able, available, and earnestly and actively seeking work. He is not ineligible for those reasons.

3. 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 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.

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant left his employment voluntarily or quit when he failed to return from a leave of absence. The employer maintains that the claimant was released to work on May 23, 2005. The claimant maintains that he was discharged when he returned to the employer and offered to go back to work on June 30, 2005 and was told that he was still on a leave of absence and he had to provide a doctor's release and the employer, in any event, had no work for the claimant. Although it is a close question, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant left his employment voluntarily. The claimant was on a leave of absence and according to Employer's Exhibit One the leave was to extend to June 28, 2005. There is no real evidence that the claimant was released to return to work on May 23, 2005. Employer's Exhibit Two is a statement by Dr. Pollack whom the claimant consulted for pain management. The statement does not state that the claimant is released to return to work. In any event, the claimant credibly testified that he was released to return to work on June 30, 2005 and went to the employer and provided a release which is the second page of Claimant's Exhibit A which is missing. It does appear on the first page of Claimant's Exhibit A that he was released to return to work on June 30, 2005. The first page contains the following "PT released" and the statement is dated June 30, 2005. This confirms the claimant's testimony that he was released to return to work on June 30, 2005. The claimant credibly testified that he returned to the employer on that day but was told by a male in human resources that he was considered to still be on a leave and he had to have a release from his physician and that, in any event, the employer had no work. Accordingly, although it is a close question, the administrative law judge concludes that what effectively occurred here was a discharge by the employer when the claimant returned to work on June 30, 2005 with the release from his physician to return to work on that day and there was no work available or at least the employer did not put the claimant back to work.

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 would be his absences for his work injury. It is clear from Claimant's Exhibits A and B that the claimant had a significant rib injury requiring rehabilitation at least through June 20, 2005. It also appears that the employer, at all material times hereto, was aware of the claimant's injury. Employer's Exhibit One indicates that the claimant was on a leave of absence with an anticipated return date of June 28, 2005. Accordingly, the administrative law judge concludes that claimant's absences were for personal illness or injury and properly reported and are not excessive unexcused absenteeism. The claimant did not respond to the letter at Employer's Exhibit One but the claimant credibly testified that he did not receive the letter so there is no disqualifying misconduct in a failure to respond to that letter. Accordingly, the administrative law judge concludes that the claimant was discharged on June 30, 2005, 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 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

Even should the claimant's separation be considered a voluntary quit or leaving, the administrative law judge would conclude that the claimant voluntarily quit because of an illness or injury to his ribs as documented in Claimant's Exhibits A and B, and he would still not be disqualified to receive unemployment insurance benefits. There is a preponderance of the evidence that the claimant had recovered and his recovery was certified by Claimant's Exhibit A and the claimant was released to return to work on June 30, 2005, but he returned to work on June 30, 2005 and his regular work or comparable suitable work was not available. Under those circumstances the claimant should not be disqualified to receive unemployment insurance benefits. The employer's witnesses seem to deny that the claimant reported to the employer on June 30, 2005, but their testimony is only hearsay and the claimant's direct testimony that he did so outweighs the hearsay evidence of the employer's witnesses. Accordingly, even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that he is still not disqualified to receive unemployment insurance benefits for the reasons set out above.

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:
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> 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 to prove 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 met his burden of proof to demonstrate by a preponderance of the evidence that, at relevant times, he is and was, able, available, and earnestly and actively seeking work. The claimant credibly testified that he has placed no physical restrictions or training restrictions on his ability to work and this is confirmed by Claimant's Exhibit A at least to the extent that he is released to work with the only restriction of minor lifting but the administrative law judge does not believe that this restriction unduly impedes the claimant's opportunity for employment. Further, there is evidence that the claimant was employed by United Farm Supply from August 1 through the first week of October. The administrative law judge notes that there is some income reported by Etcher Farms, Inc., in the third quarter of 2005. The claimant also credibly testified that he had placed no time or day restrictions on his availability for work. Finally, the claimant credibly testified that he is earnestly and actively seeking work by making at least two in-person job contacts each week. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise entitled to such benefits.

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 $2,682.00 since separating from the employer herein on or about June 30, 2005 and filing for such benefits effective October 16, 2005. 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 November 10, 2005, reference 02, is affirmed. The claimant, Byron L. Farrington, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. The claimant is, and was, at relevant times, able, available, and earnestly and actively seeking work.

As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw