

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

KENNETH A GASKIN  
509 – 23<sup>RD</sup> ST  
BETTENDORF IA 52722

IOC SERVICES LLC  
1641 POPPS FERRY RD B1  
BILOXI MS 39532-2226

Appeal Number: 05A-UI-11100-RT  
OC: 10/02/05 R: 04  
Claimant: Appellant (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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Kenneth A. Gaskin, filed a timely appeal from an unemployment insurance decision dated October 19, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on November 14, 2005, with the claimant participating. Jason True, Human Resources Manager, participated in the hearing for the employer, IOC Services LLC. 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 as a

full-time banquet set-up person from August 30, 2004 until he was discharged on September 27, 2005 for poor attendance. On September 26, 2005, the claimant was absent. He properly reported this absence. The claimant was absent because he was out of town in Arkansas and he missed his bus. Apparently there had been a rainstorm and the bus was delayed and the claimant waited 15 minutes for the bus but then his brother with whom he was staying got impatient and left with the claimant. The claimant then missed his bus. The employer has a rule or policy that an employee must call in and notify the employer of an absence or a tardy two hours before the start of the employees shift. The claimant properly reported this absence.

In the three months prior to the claimant's discharge the claimant was also tardy 11 times as follows: August 31, 2005, a few minutes; August 22, 2005, a few minutes; August 20, 2005, 15 minutes; August 6, 2005, a few minutes; August 3, 2005, 15 minutes; August 2, 2005, a few minutes; July 25, 2005, 15 minutes; July 9, 2005, 15 minutes; June 22, 2005, a few minutes; June 16, 2005, a few minutes; and May 29, 2005, 15 minutes. None of these tardies were properly reported to the employer. The claimant was tardy on these occasions because he walks to work and is only five blocks from the employer if he crosses the railroad tracks. However, if there is a train on the tracks then the claimant must take another route going over a bridge and this makes him late. The claimant could have left for work earlier to account for the train being on the tracks but the claimant figured that he would be able to get over the tracks. The claimant seemed to admit that the tardies were his fault.

The claimant received a final written warning for attendance on September 12, 2005, informing him that future occurrences could result in his termination. The claimant also received a written warning for his attendance on August 22, 2005 and a verbal counseling with a written record on August 3, 2005. The claimant knew his job was in jeopardy.

#### 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.

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 testified, and the administrative law judge concludes, that the claimant was discharged on September 27, 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. IDJS, 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. There is very little dispute in the evidence. On September 26, 2005, the claimant was absent from work because he was out of town in Arkansas and missed his bus. The claimant testified that there was a rainstorm and the bus was delayed and he waited for 15 minutes but his brother became impatient and therefore they left and he missed the bus. The evidence also indicates that the claimant was tardy on 11 occasions in three months as set out in the findings-of-fact. The claimant did not properly report any of these tardies. The claimant was tardy because sometimes when he walked to work a train would be across the railroad tracks and he would have to redirect his route over a bridge. The claimant lives five blocks from work if he crosses the railroad tracks. If there is a train over the tracks the claimant has to change his route, which takes him longer and he is late. When asked why the claimant could not have left for work earlier the claimant stated that he figured he could get over the train tracks and be at work on time. The administrative law judge must conclude that these tardies were not for reasonable cause and not properly reported. The claimant could have left for work earlier but chose not to. The fact that the claimant was tardy so often should indicate to the claimant that he needed to leave for work earlier. He did not. The administrative law judge further concludes that the claimant's absence on September 26, 2005 was not for reasonable cause although it was properly reported. By September 26, 2005, the claimant was fully aware that his attendance was a real problem. Nevertheless, the claimant did not wait until the bus left but waited only 15 minutes and then left and found out that he had missed his bus. The claimant received sufficient warnings to put him on notice that his job was in jeopardy because of his attendance. The claimant received a final

written warning on September 12, 2005, a written warning on August 22, 2005, and a verbal counseling with a written record on August 3, 2005. The administrative law judge is constrained to conclude here that the claimant's absence and tardies were 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.

**DECISION:**

The representative's decision of October 19, 2005, reference 01, is affirmed. The claimant, Kenneth A. Gaskin, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism.

dj/kjw