

**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**

**CHARLIE P NICOLAY
217 – 1ST AVE NW
OELWEIN IA 50662**

**DECKER ACQUISITION CORP
500 WADENA RD
PO BOX 640
FAYETTE IA 52142**

**Appeal Number: 06A-UI-00218-HT
OC: 01/02/05 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, 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

STATEMENT OF THE CASE:

The claimant, Charlie Nicolay, filed an appeal from a decision dated December 28, 2005, reference 03. The decision disqualified him from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on January 24, 2006. The claimant participated on his own behalf. The employer, Decker Acquisition Corporation (Decker), participated by Controller Kaylene Schott and Plant Supervisor Dale Meyer

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: Charlie Nicolay was employed by Decker from

April 4 until December 6, 2005. He was a full-time welder. At the time of hire the claimant received a copy of the employer's attendance policy. Absenteeism and tardiness are counted by points, with an accumulation of three points in a 90-day period resulting in discharge. An absence due to illness will not be counted if the employee has a doctor's excuse.

Mr. Nicolay was absent on November 23, 2005, but did not have a doctor's excuse. He was assessed one point. The first disciplinary step is a verbal warning at one and one-half points, but his next absence was a no-call/no-show to work on December 3, 2005, when he was assessed two points. He was absent because he had overslept until 1:00 p.m. and did not report for the mandatory overtime, and reached three points. General Manager Ed Smith discharged him when he reported for work on Monday, December 5, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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, (7) provide:

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.

The claimant knew the company policy regarding point accumulation and the necessity of having a doctor's excuse for any absences due to illness. He did not get a doctor's statement to excuse him from work on November 23, 2005, and got his first point. The second absence in the 90-day period was a no-call/no-show to work for mandatory overtime due to oversleeping. This is not considered an excused absence under Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant's absences in less than a month were not properly reported or excused. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

DECISION:

The representative's decision of December 28, 2005, reference 03, is affirmed. Charlie Nicolay is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible.

bgh/tjc