

**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**

**KELLI R LAUER
PO BOX 154
WESTGATE IA 50681**

**TYSON RETAIL DELI MEATS INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-03551-RT
OC: 03-21-04 R: 04
Claimant: Appellant (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

STATEMENT OF THE CASE:

The claimant, Kelli R. Lauer, filed a timely appeal from an unemployment insurance decision dated April 1, 2005, reference 04, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on April 25, 2005, with the claimant participating. Brooke Salger, Human Resources Manager, participated in the hearing for the employer, Tyson Retail Deli Meats, Inc. Employer's Exhibit One and Claimant's Exhibit A were 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 One and Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time production worker from November 30, 2000 until she was discharged on March 9, 2005 for poor attendance. The claimant's attendance record is shown at Employer's Exhibit One. The employer had no evidence that the claimant was not sick as the claimant claimed and as shown on Employer's Exhibit One. The claimant properly reported her absences except for the alleged improper reporting on February 20, 2005. The employer maintains the claimant called late but the claimant contested this, claiming that she had called on time. The only absences at issue in 2005 were absences on February 7 and 9, 2005 for weather. The employer's witness could not remember the weather but the claimant credibly testified that the roads were slippery and on one of those days she slid into a ditch. The claimant received a written warning for her attendance on January 11, 2005 and another one on February 25, 2005. Previously, the claimant received a written warning on November 23, 2003. Between November 2003 and January 2005, the claimant's attendance was satisfactory. In 2005, the claimant ran into a number of illnesses and bad weather which caused her attendance to deteriorate.

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 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.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on March 9, 2005. In order to be disqualified to receive unemployment insurance benefits, 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. Employer's Exhibit One sets out the claimant's absences. With the exception of an absence on February 20, 2005 for personal illness which the employer alleged was not properly reported, and two for weather on February 7 and 9, 2005, the claimant's recent absences appear to either be for personal illness and properly reported or were excused by the employer or were for bad weather which were also excused by the employer. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant did not properly report her absence on February 20, 2005. The claimant testified that she timely called in. The claimant established a pattern as shown at Employer's Exhibit One of properly reporting her absences and the administrative law judge concludes that the claimant also properly reported this absence. Concerning the two absences on February 7 and 9, 2005 for weather, the administrative law judge concludes that there is not a preponderance of the evidence that the weather was not bad. The employer's witness did not recall what the weather was like. The claimant credibly testified that the roads were very slippery and one of those days she slid into a ditch. Accordingly, the administrative law judge concludes that the claimant's absences were for reasonable cause or personal illness and properly reported and were not excessive unexcused absenteeism.

The administrative law judge notes that from November 2003 until January 2005 the claimant's attendance was satisfactory. The claimant encountered a number of illnesses and bad weather in 2005. This is not the fault of the claimant. It is true that the claimant received a written warning on January 11, 2005 and another on February 25, 2005 but as noted above, the administrative law judge concludes that the claimant's absences giving rise to those warnings were not excessive unexcused absenteeism. The administrative law judge also notes that in general it requires three unexcused absences or tardies to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App.

1982). Even discounting the claimant's testimony, the claimant only had three such absences. Accordingly, and for all of the reasons set out above, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct and, as a consequence, she 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 the denial of unemployment insurance benefits and misconduct to support a disqualification for 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 her disqualification to receive unemployment insurance benefits. The administrative law judge notes that the employer has a point attendance policy but that is not relevant here. The issue before the administrative law judge is whether the claimant's absences were for reasonable cause or personal illness and properly reported. The administrative law judge concludes that they were. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of April 1, 2005, reference 04, is reversed. The claimant, Kelli R Lauer, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

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