

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

WILLIAM J SILVIA
1013 – 8TH ST NW
WELLMAN IA 52256

HUBER SLATS INC
1497 – 170TH ST
WELLMAN IA 52356

Appeal Number: 05A-UI-00228-HT
OC: 12/05/04 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

STATEMENT OF THE CASE:

The employer, Huber Slats, filed an appeal from a decision dated January 3, 2005, reference 01. The decision allowed benefits to the claimant, William Silvia. After due notice was issued, a hearing was held by telephone conference call on January 24, 2005. The claimant participated on his own behalf. The employer participated by Bookkeeper Zana Ennis and Laborer Mike Kurtz.

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: William Silvia was employed by Huber Slats from

July 26 until December 6, 2004. He was a full-time laborer. During the four months he was employed the claimant missed 15 days of work. For most of the absences he did not call in because he had decided his messages were not being received. This actually happened only once when the answering machine was "full." At no time did anyone at Huber Slats give the claimant any warnings regarding his absenteeism.

He was no-call/no-show to work on November 23 and 24, 2004, and Owner Bill Huber instructed Bookkeeper Zana Ennis to call Mr. Silvia and tell him not to bother coming in until November 29, 2004. During that week he was absent on Wednesday when he was again no-call/no-show and on Friday, when he had permission from Mr. Huber to be off work.

On Monday, December 6, 2004, Ms. Ennis left a message on his voice mail indicating he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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), (8) 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.

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The claimant undoubtedly missed far too many days of work, most of which were not properly reported. However, he was never advised by the employer his job was in jeopardy as a result. He continued being no-call/no-show to work because no one ever told him it was unacceptable or that he was in danger of being fired because of it. The final incident which precipitated the decision to discharge was an absence on Friday, December 3, 2004. However, that was an approved day off and cannot be considered an unexcused absence. The actual final, unexcused absence was on December 1, 2004, and the employer has offered no explanation as to why he was not discharged on December 2, 2004. As a result, no disqualification may be imposed.

DECISION:

The representative's decision of January 3, 2005, reference 01, is affirmed. William Silvia is qualified for benefits, provided he is otherwise eligible.

bgh/b