

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

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Appeal Number: 04A-UI-00330-R  
OC: 11-30-03 R: 02  
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, 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, Anthony P. Adoul, filed a timely appeal from an unemployment insurance decision dated January 5, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, on February 17, 2004, with the claimant participating. The claimant was represented by Randall P. Schueller, Attorney at Law. Tom Barragan, Employment Manager at the Perry, Iowa facility, participated in the hearing for the employer, Tyson Fresh Meats, Inc. 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 production worker from August 6, 2001 until he was discharged on December 4, 2003 for poor attendance. On December 1, 2003 the claimant was tardy one hour and three minutes because he overslept and he did not properly report this tardy. The employer has a rule covered in orientation, of which the claimant was aware, providing that an employee who is going to be absent or tardy must notify the employer one-half hour prior to the start of the employee's shift. The claimant was also absent on October 27, 2003 for personal business but does not specifically remember that absence. The claimant was absent occasionally for personal business because of transportation or to get a driver's license. On October 17, 2003, the claimant was tardy eight minutes. He had lost the combination to his locker, which is provided by the employer, and he needed to contact his supervisor to get a new combination and this caused him to be late to the line, which caused him to be tardy. Although an employee punches a time clock before he or she goes to the locker, a tardy is determined from the time when an employee is to be on the line, which is called "gang time." The claimant was also tardy on September 5, 2003 for over three hours because he had a dentist appointment but he informed the employer in advance of his appointment. The claimant was also tardy on August 1, 2003, 5½ hours for personal business, as noted above, but the claimant did not specifically recall what this tardy was for. The claimant also had a number of absences and some tardies that were considered excused by the employer as follows: November 10, 2003; November 7, 2003 (tardy); October 3, 2003; September 29, 2003 (tardy); July 28, 2003; and July 21, 2003. The claimant received two warnings, a written letter on July 21, 2003 and another written letter on September 29, 2003. The claimant had no other warnings in 2003.

#### 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, (7) 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).

(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.

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. Although it is a close question, 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. The claimant had a number of tardies and absences that were excused by the employer, as shown in the findings of facts and these are not considered excessive unexcused absenteeism. In addition to these absences and tardies, the claimant was tardy on December 1, 2003 for one hour and three minutes because he overslept and did not properly report this tardy. This tardy was not for reasonable cause and not properly reported. The claimant was also absent on October 27, 2003 for personal business. The claimant could not specifically remember this tardy but did testify credibly that when he was absent for personal business it was because of transportation matters or to get a driver's license. The employer did not know if the claimant had properly reported this absence. On the evidence here, the administrative law judge concludes that there is not a preponderance of the evidence that this absence was not for reasonable cause or personal illness and not properly reported. The claimant was also tardy on October 17, 2003 for eight minutes. The employer categorized this as an unexcused tardy. The claimant credibly testified that he was tardy on that occasion because he had lost the combination to his locker and his supervisor told him to get a new combination. This caused the claimant to be eight minutes late to the line where he actually worked. Although the claimant punches a time clock, tardies are determined not from the time clock punch but from when the employees show up for the line. The administrative law judge concludes that this tardy was for reasonable cause and no proper reporting was necessary since the claimant was on time but was tardy merely because he had lost the combination to his locker and was told to get a new one. The employer furnishes the locker and the combination lock to the employees. The claimant was also tardy on September 5, 2003 over three hours. The claimant testified he was tardy because of a dentist appointment and that he had given the employer proper notification. The

administrative law judge concludes that this tardy was for personal illness or reasonable cause and properly reported. Finally, the claimant was tardy on August 1, 2003 5½ hours for personal business. The claimant did not remember this tardy. The employer did not know if this tardy had been properly reported. As noted above, the claimant's tardies and absences for personal business dealt with transportation or driver's license. The administrative law judge concludes that there is not a preponderance of the evidence that this tardy was not for reasonable cause or personal illness and not properly reported. Accordingly, the administrative law judge concludes that there is really only one tardy, on December 1, 2003, for oversleeping, which was not for reasonable cause and not properly reported. Generally, it requires three unexcused absences or tardies to establish excessive unexcused absenteeism. See, for example, Clark v. Iowa Department of Job Service, 317 N.W. 2d 517 (Iowa App. 1982). Here, the claimant only had one such tardy. Even assuming that the claimant's absence on October 27, 2003 and his tardy on August 1, 2003, which were both for personal business but neither of which the claimant could specifically remember, were not for reasonable cause and not properly reported, this should only make three such absences or tardies, which would barely establish excessive unexcused absenteeism and these three absences or tardies would be spread over four months. It is true that the claimant received two warnings for his attendance in 2003 but the last occurred on September 29, 2003, over two months before his discharge.

Accordingly, and for all the reasons set out above, the administrative law judge concludes the claimant's absences and tardies were not excessive unexcused absenteeism and not 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 a 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.

#### DECISION:

The representative's decision of January 5, 2004, reference 01, is reversed. The claimant, Anthony P. Adoul, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

dj/b