

**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**

**JULIE A COBURN
1773 KEPPEN
LINCOLN PARK MI 48146**

**EXEL INC
c/o TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160**

**Appeal Number: 05A-UI-03199-RT
OC: 05-16-04 R: 12
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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Exel, Inc., filed a timely appeal from an unemployment insurance decision dated March 14, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Julie A. Coburn. After due notice was issued, a telephone hearing was held on April 13, 2005, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer is represented by TALX Employer Services which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the

hearing. 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 witness 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 clerical auditor from October 18, 2004 until she was discharged on February 15, 2005 for poor attendance. On February 14, 2005, the claimant was absent to take her daughter to the doctor. She provided the employer a doctor's note. This absence was properly reported. Nevertheless, the claimant was discharged. On February 9, 2005, the claimant was tardy two hours because she had a prenatal exam and then a car accident when going to work. The claimant had taken "volunteer time off" one month in advance for the prenatal exam. On February 1, 2005, the claimant left work early because she had an appointment concerning housing. The claimant had taken "volunteer time off" for this one month in advance. On January 26, 2005, the claimant was absent for personal illness and this was properly reported. On January 24, 2005, the claimant was tardy two hours for a WIC appointment for which she took "volunteer time off" one month in advance. On December 3, 2004, the claimant was tardy 15 minutes because of weather and she properly reported this tardy. The claimant was tardy on December 1, 2004, 15 minutes again for weather and again this was properly reported. The claimant had two other absences, on December 17 and 29, 2004. The claimant did not recall specifically why but believed that she was ill because she had just learned that she was pregnant. The claimant properly reported all absences and tardies. The claimant was also tardy on November 3 and 10, 2004, 15 minutes each but did not remember why. The claimant received two written warnings for her attendance; the first on December 7, 2004 and the second on January 27, 2005. Pursuant to her claim for unemployment insurance benefits filed effective May 16, 2004 and reopened effective January 16, 2005 and February 13, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,664.00 since separating from her employer on or about February 15, 2005 as follows: \$212.00 for benefit week ending February 19, 2005 (earnings \$90.00) and \$242.00 per week for six weeks from benefit week ending February 26, 2005 to benefit week ending April 2, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She 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 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 claimant credibly testified, and the administrative law judge concludes, that the claimant was discharged on February 15, 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. 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. The employer did not participate in the hearing and provide evidence of absences on the part of the claimant that were not for reasonable cause and not properly reported. The claimant credibly testified as to a number of absences and tardies as set out in the findings of fact. The claimant had satisfactory explanations for all of the absences and tardies after December 1, 2004 as set out in the findings of fact. The claimant testified that all of these absences and tardies were also properly reported. The claimant could not remember the two tardies in November 2004 nor could she remember the two absences in November 2004. However, the claimant credibly testified that she believed she was ill because she had just learned that she was pregnant. The claimant testified that she

properly reported these absences and tardies. Under the evidence here, in the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that the claimant's absences and tardies were for reasonable cause or personal illness and properly reported and were not excessive unexcused absenteeism. It is true that the claimant received two written warnings for her attendance but as noted above, the absences and tardies were for reasonable cause or personal illness and properly reported and were not excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for 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 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 her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,664.00 since separating from the employer herein on or about February 15, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of March 14, 2005, reference 02, is affirmed. The claimant, Julie A. Coburn, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/pjs