

**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**

**MIKE J GADZA
1311 WALNUT ST
HAMILTON IL 52341**

**REMEDY TEMPORARY SERVICES
INC
c/o TALX UC EXPRESS
PO BOX 66864
ST LOUIS MO 63166-6864**

**Appeal Number: 05A-UI-05992-RT
OC: 05-01-05 R: 04
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, Remedy Temporary Services, Inc., filed a timely appeal from an unemployment insurance decision dated May 24, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Mike J. Gadza. After due notice was issued, a telephone hearing was held on June 23, 2005, with the claimant participating. The employer did not participate in the hearing. Although the employer or its representative, TALX UC eXpress, called in a telephone number where a witness, Angie Vaughn, purportedly could be reached for the hearing, when the administrative law judge called that number at 2:01 p.m., he reached a voice mail message identifying the number as that of the employer. The administrative law judge left a message

that he was going to proceed with the hearing and if the employer wanted to participate, the employer, or someone on behalf of the employer, needed to call before the hearing was over and the record was closed. The hearing began when the record was opened at 2:05 p.m. and ended when the record was closed at 2:19 p.m. and no one from the employer had called during that time. The employer is represented by TALX UC eXpress which is well aware of the need to call in a telephone number in advance of the hearing and have a witness present at that number at the time for 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. At 2:00 p.m. on June 10, 2005, the administrative law judge received a telephone call from the claimant. The claimant wanted his hearing changed from a telephone hearing to an in-person hearing. When the administrative law judge explained that the in-person hearing would be significantly delayed, the claimant decided to remain with the telephone hearing. The claimant participated in a telephone hearing.

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 employer is a temporary employment agency. The claimant was employed with the employer beginning in November 2004 when he was assigned to Scott's Fertilizer beginning in November 2004 until the claimant was discharged on March 10, 2005. The claimant was discharged for poor attendance. Although the claimant's position was part time, most of his hours were full time. On March 7 and 8, 2005, the claimant was absent for personal illness. He properly informed the employer of each absence. The employer then was to inform the assignee, in this case, Scott's Fertilizer. The claimant was off on March 9, 2005, and when he brought his doctor's excuse into the employer on March 10, 2005, he was informed that he was discharged. The claimant had two prior absences but did not remember the dates. One absence was for personal illness and he properly notified the employer of this absence and the other absence was for the illness of his child and he also properly notified the employer of this absence. The claimant received two written warnings: one on December 13, 2004 and one on February 26, 2005. However, the claimant made up both of those warnings and absences by not being absent for 30 days thereafter under the employer's policies. Pursuant to his claim for unemployment insurance benefits filed effective May 1, 2005, the claimant has received unemployment insurance benefits in the amount of \$861.00 as follows: \$123.00 per week for seven weeks from benefit week ending May 7, 2005 to benefit week ending June 18, 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. 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 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 he was discharged on March 10, 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. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence in such a

degree of recurrence as to be disqualifying misconduct and/or excessive unexcused absenteeism which would also be disqualifying misconduct.

The claimant credibly testified that he had four absences, three of which were for personal illness and properly reported. The other absence was for the illness of his child and this also was properly reported. The administrative law judge concludes that these absences were for personal illness or reasonable cause and properly reported and were not excessive unexcused absenteeism. It is true that the claimant received two written warnings but nevertheless his absences which generated those warnings are not excessive unexcused absenteeism. Accordingly, the administrative law judge concludes that the claimant was discharged but not for 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 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.

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 \$861.00 since separating from the employer herein on or about March 10, 2005 and filing for such benefits effective May 1, 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 May 24, 2005, reference 01, is affirmed. The claimant, Mike J. Gadza, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he 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 his separation from the employer herein.

pjs/pjs