

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

GREGORY A JOHNSON
1440 RIVER RD BLV
INDEPENDENCE IA 50644

TYSON RETAIL DELI MEATS INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-03433-JTT
OC: 02/27/05 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 9 6.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 25, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 21, 2005. Gregory Johnson participated in the hearing. Brooke Salger, Human Resources Manager, representing employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Gregory Johnson was employed by Tyson Retail Deli Meats as a full-time production worker from November 29, 2004 until February 22, 2005, when Gary Kaiser, Manager, discharged him for misconduct based on excessive absences. The final absence that prompted the discharge

occurred on February 21, 2005, when Mr. Johnson was a "no-call, no-show" for his scheduled shift.

The employer does not have an employee handbook. The employer has an attendance policy that is posted in the employee hallway at the workplace. Mr. Johnson was still in his probationary period of employment, and was, therefore, subject to termination if he accrued five attendance points. Under the attendance policy, employees who need to be absent from work are supposed to contact their supervisor or the Human Resources Department at least 30 minutes prior to the scheduled start of their shift.

The prior absences that the employer took into account were as follows. On December 28, 2004, Mr. Johnson was absent because he did not have a ride to work. On January 5, 2005, Mr. Johnson was absent from work due to bad weather and impassable roads. The employer did not count this absence against him. On January 17-18, 2005, Mr. Johnson was absent due to illness, and properly notified the employer. On January 19, 2005, Mr. Johnson went to work, but left early due to illness.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Johnson was discharged for misconduct in connection with his employment based on excessive unexcused absences. It does 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(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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Johnson's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the employer must show that the *unexcused*

absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Mr. Johnson's absence on February 21, 2005 was based on a lack of transportation and was, therefore, an unexcused absence. The evidence in the record indicates that Mr. Johnson's only other unexcused absence occurred on December 28, 2004, when Mr. Johnson lacked a ride to work. The rest of Mr. Johnson's absences were excused.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Johnson's unexcused absences were not excessive. Mr. Johnson was discharged for no disqualifying reason. Benefits are allowed, provided Mr. Johnson is otherwise eligible.

DECISION:

The representative's decision dated March 25, 2005, reference 01, is affirmed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/pjs