

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

c/o C DILLARD  
BRANDON STEPHENSON  
7169 – 90<sup>TH</sup> AVE  
INDIANOLA IA 50125

KEMIN FOODS LC-ADP  
PO BOX 70  
DES MOINES IA 50301

Appeal Number: 05A-UI-12169-BT  
OC: 10/30/05 R: 02  
Claimant: Respondent (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  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Kemin Foods (employer) appealed an unemployment insurance decision dated November 23, 2005, reference 02, which held that Brandon Stephenson (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was started on December 19, 2005 and finished on December 21, 2005. The claimant participated in the hearing. The employer participated through David Larson, Human Resources Generalist; Kent Casebolt, Supervisor; Todd Fees, Supervisor; and Elizabeth Nelson, Corporate Counsel. Claimant's Exhibit A and Employer's Exhibits One through Seven were admitted into evidence.

#### FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time shift leader from March 29, 2001 through October 17, 2005. He was discharged for excessive unexcused absenteeism. The employer's attendance policy provides that employees will be terminated if they reach negative 10 attendance points. Undocumented absences will result in a loss of one point and tardiness will result in a loss of a half point for each occurrence. Employees are given one point for each month of attendance without tardiness or undocumented absences. A verbal warning is issued at negative two points, a written verbal warning at negative four points, a written warning at negative six points and a written warning with a three-day suspension at negative eight points. Termination could occur at negative eight points but always occurs at negative ten points.

A written warning was issued to the claimant on June 6, 2005 for reaching the negative six-point level, although the employer mistakenly notes in a September 27 memorandum that it was issued on September 6, 2005. The claimant was tardy on September 27, which put him at negative eight points. He received a written warning and was suspended for three days ending September 30. The claimant last worked on October 10 and called the employer on October 11, reporting that he was not able to make it in but would bring a doctor's note on October 13, 2005. The claimant was a no-call/no-show on October 13 and 14 but called late Friday afternoon. He asked whether he should just come in and clean out his locker. The employer asked why he did not call in and he stated that he probably should have done so. The employer told the claimant if he reported to work on Monday, October 17 and brought in a doctor's note that outlined the reasons for his absences, he could continue working. The claimant was a no-call/no-show on October 17 but brought in a doctor's note on October 19, 2005. The doctor's note was issued on October 11 and allowed the claimant to return to work on October 12, 2005. Someone added the date of October 14, 2005 after October 12 and the employer testified that it looks like the claimant's writing. The claimant did not call or report to work because he had no telephone and no transportation.

The claimant filed a claim for unemployment insurance benefits effective October 30, 2005 and has received benefits after the separation from employment in the amount of \$2,268.00.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a.

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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on October 17, 2005 for excessive unexcused absenteeism.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant contends that he always tried to get to work, but his intent to work is not the issue. The claimant was absent without excuse on October 12, 13, 14 and 17 as a result of transportation problems.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absences were not excused. The final absences, in combination with the claimant's history of absenteeism, are considered excessive. Benefits are withheld.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The unemployment insurance decision dated November 23, 2005, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,268.00.

sdb/kjw