

**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**

**WILLIE B JOHNSON
803 LYON ST
DES MOINES IA 50309**

**YOUNG MENS CHRISTIAN ASSOCIATION
101 LOCUST ST
DES MOINES IA 50309**

**Appeal Number: 05A-UI-02497-RT
OC: 01-30-05 R: 02
Claimant: Respondent (5)**

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, Young Mens Christian Association, filed a timely appeal from an unemployment insurance decision dated March 1, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Willie B. Johnson. After due notice was issued, a telephone hearing was held on March 28, 2005 with the claimant participating. William Luke Seward, Executive Director, participated in the hearing for the employer. Stacy Haviland sat in on the hearing for the employer but did not participate or testify. 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 case manager from April 27, 2004 until he was discharged on July 13, 2004. The claimant was discharged for poor attendance, a failure to complete his case files appropriately and professional attire. On July 7, 2004, the claimant was absent. He called in and properly notified the employer that he would be late but never showed up for work and never notified the employer otherwise. The employer has a rule or policy that employees must call in as soon as possible if they are going to be absent and before the shift is to start. On July 6, 2004, the claimant called in his tardy but then never called the employer back to state that he was going to be absent for the entire day. The claimant was absent the entire day because he had a medical appointment that took longer than expected. During the week of June 25, 2004, the claimant left work early two times or was at least away from his office for significant periods of time. The claimant has an office near the reception desk. When the claimant was away from his office, he was unable to check in a client as was part of his duties. The claimant also left work early on four other occasions or at least was not at his work station for significant periods of time. The claimant is supposed to be available for clients so he needs to be in his office. The claimant is not to meet with clients in their rooms. The clients have telephones in their rooms so that the claimant can call them to come down if he needs to see them.

The claimant failed to complete some case files appropriately. At least on one occasion, it was because his computer was down. During the week of July 5, the claimant was inappropriately attired in that his shirt was not ironed and not tucked in. For these reasons the claimant was discharged.

The claimant received an oral warning for all three of these matters on June 14, 2004 and a written warning on June 24, 2004. However, after the written warning, the claimant persisted in leaving work early or at least being away from his work area.

Following his separation from the employer herein on July 13, 2004 and prior to filing for unemployment insurance benefits, the claimant had earnings in the fourth quarter of 2004 as follows: \$1,626.00 from Des Moines-St. Anthony and \$43.94 from KBS of Delaware LLC. The total earned in the fourth quarter of 2003 was \$1,669.94. This exceeds ten times the claimant's weekly benefit amount of \$158.00 or \$1,580.00. Therefore, the claimant has requalified to receive unemployment insurance benefits following his separation from the employer herein. The claimant filed for unemployment insurance benefits effective January 30, 2005 and received unemployment insurance benefits in the amount of \$1,422.00 as follows: \$158.00 per week for nine weeks from benefit week ending February 5, 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, but the claimant has requalified to receive unemployment insurance benefits following his disqualifying separation from the employer herein.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not because the claimant received no benefits until he had requalified to receive unemployment insurance benefits following his disqualifying separation from the employer herein.

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) provide:

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.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on July 13, 2004. 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). The administrative law judge concludes that employer has met its burden of proof to demonstrate by a preponderance of the

evidence that the claimant was discharged for disqualifying misconduct, including excessive unexcused absenteeism. The employers witness, William Luke Seward, Executive Director, credibly testified that the claimant was discharged for attendance and, in particular, leaving work early or at least being away from his office on six different occasions as set out in the findings of fact. The claimant denies that he left work early but concedes that he may have been away from his office conducting other business in the building. However, the evidence establishes that the claimant should have been in his office. The claimant needed to be available for clients so he needed to be in his office which was near the reception area. The claimant was away from his office one day and could not be found and was unable to check in a client which was one of his duties. The claimant testified that he had to meet with clients in his room but Mr. Seward credibly testified that employees are not to meet with clients in their room but are to have the clients come to the office. Further, there was evidence that the residents had phones in their room that the claimant could have used. The administrative law judge concludes that the occasions when the claimant left work early or at least was away from his office were not for reasonable cause or personal illness and not properly reported and were excessive unexcused absenteeism and a violation of the employer's expectations.

The evidence also establishes that the claimant was absent on July 6, 2004. The claimant properly notified the employer that he was going to be tardy but then did not come to work at all. The claimant did not call the employer back and notify the employer that he was not going to be at work at all. The claimant testified that he was at a medical appointment that took longer. Claimant testified that he told his supervisor in advance. All of this may be true but the claimant could have, and should have, notified the employer that he was not going to be at work at all. The employer then would not have counted on the claimant coming in late and could have dealt with his entire absence. The claimant did not do so. The administrative law judge concludes that this absence was not properly reported. The claimant received a verbal warning on June 14, 2004 and a written warning on June 24, 2004 about these matters as well as other matters. Because of the warnings the claimant received and the claimant's repeated leaving work early or at least being away from his work area for significant periods of time without permission, these occasions are excessive unexcused absenteeism and further deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are disqualifying misconduct.

Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, the claimant would be disqualified to receive unemployment insurance benefits. However, following this disqualifying separation, the claimant has requalified to receive unemployment insurance benefits as set out in the findings of fact and, therefore, the claimant is not disqualified to receive unemployment insurance benefits. However, any unemployment insurance benefits to which the claimant is entitled shall not be charged against the account of the employer herein.

Mr. Seward raised two other reasons for the claimant's discharge, lack of completing case files and professional attire. The administrative law judge concludes that there is not a preponderance of the evidence that either of these acts was disqualifying misconduct. Rather, the claimant's acts here appear to be inefficiency, unsatisfactory conduct or failure in good performance and are not disqualifying misconduct.

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 \$1,422.00 since separating from the employer herein on or about July 13, 2004 and filing for such benefits effective January 30, 2005. The administrative law judge concludes that the claimant is not overpaid these unemployment insurance benefits at least insofar as his separation from the employer herein is concerned. His separation from the employer was disqualifying but the claimant has requalified to receive unemployment insurance benefits following his disqualifying separation on July 13, 2004 and, therefore, the claimant would not be overpaid these benefits as a result of his separation from the employer herein.

DECISION:

The representative's decision of March 1, 2005, reference 01, is modified. The claimant, Willie B. Johnson, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he requalified to receive unemployment insurance benefits following his disqualifying separation from the employer herein. The claimant's separation from the employer herein on July 13, 2004 was potentially disqualifying because he was discharged for disqualifying misconduct but he has requalified to receive unemployment insurance benefits following that separation. Any unemployment insurance benefits to which the claimant is entitled related to wage credits with the employer herein shall not be charged against the account of the employer herein. Since the claimant has requalified to receive unemployment insurance benefits following his separation from the employer herein, he is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

tjc/tjc