

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

EDWARD M STENOISH
1301 HIGH AVE W APT 2
OSKALOOSA IA 52577

OTTUMWA DEVELOPMENTS INC
D/B/A OTTUMWA MANOR
927 E PENN AVE
OTTUMWA IA 52501

Appeal Number: 05O-UI-03609-RT
OC: 04-11-04 R: 03
Claimant: Appellant (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 claimant, Edward M. Stenoish, filed a timely appeal from an unemployment insurance decision dated January 21, 2005, reference 03, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on April 27, 2005, with the claimant participating. Paula Thomas, Director of Nursing, participated in the hearing for the employer, Ottumwa Developments, Inc. doing business as Ottumwa Manor. Helen Jo Boerman, Administrator, arrived late for the hearing but testified for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. An initial hearing was held on February 15, 2005 without the employer participating. By decision dated February 24, 2005, the administrative law judge allowed benefits to the claimant. The employer appealed to the Employment Appeal Board. By

decision dated March 3, 2005, the Employment Appeal Board remanded this matter for another hearing.

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 full time certified nursing assistant (CNA) from March 1, 2001 until he was separated from his employment on December 28 or 29, 2004. The claimant was scheduled to work on December 27, 2004 but was absent from work because the person with whom he rode to work had a migraine headache and was ill and could not come to work. The claimant notified the employer at 10:30 p.m. the night before and could not get a replacement and so informed the employer the next day. At some point, the claimant was informed that if he did not come to work or find a replacement, he would not have a job but the claimant did not come to work and did not find a replacement. The next day, December 29, 2004, the claimant came to work and was told that he did not have a job. The employer has a rule of which the claimant was aware that an employee must notify the employer two hours before the start of the employee's shift if that employee is going to be absent or tardy and the employee must also find a replacement.

On December 25, 2004, the claimant was absent because he had no ride although he did have a replacement worker. He called the employer the day before to notify the employer that he was going to be absent. On December 17, 2004, the claimant was again absent for lack of transportation or no ride. He notified the employer late on this occasion. The claimant was also absent on December 4, 2004 again because he had no ride but he did notify the employer the day before, December 3, 2004. Again on November 15, 2004 the claimant was tardy two hours and five minutes because of transportation but he did notify the employer. On November 2, 2004, the claimant was tardy because of car trouble. He did notify the employer but not within two hours before the start of his shift. On November 1, 2004, the claimant was tardy one hour and twenty minutes because his ride was delayed and he did not notify the employer on this occasion. The claimant was absent on September 24 and 25, 2004 for personal illness and these were properly reported. The claimant received several verbal warnings about his attendance prior to his discharge. Pursuant to his claim for unemployment insurance benefits for benefit year from April 11, 2004 to April 10, 2005, the claimant has received unemployment insurance benefits among other benefits in the amount of \$4,495.00 as follows: \$295.00 for benefit week ending January 1, 2005 (earnings \$80.00) and \$300.000 per week for 14 weeks from benefit week ending January 8, 2005 to benefit week ending April 9, 2005. Of that amount, \$542.00 was offset against an overpayment for 2004.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 first issue to be resolved is the character of the separation. The employer maintains that claimant voluntarily quit when he was absent from work on December 28, 2004. However, there were no other consecutive absences and the claimant did come to work on December 29, 2004 when he was told that he no longer had a job. The administrative law judge concludes that this one absence does not establish a voluntary quit. Therefore, the administrative law judge concludes that the claimant was discharged on December 29, 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. IDJS, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. At the outset, the administrative law judge notes that neither party was particularly credible. Mr. Stenoish could not remember many of his absences and was combative and argumentative and absolutely denied any verbal warnings for his attendance. The employer's main witness, Paula Thomas, Director of Nursing, was not prepared for the hearing and occasionally was equivocal. However, she testified from records which adds some credibility to her testimony. The claimant had four absences in December 2004 all for a lack of transportation as set out in the findings of fact. The claimant also had three tardies in November of 2004 again for a lack of transportation also as set out in the findings of fact. The claimant testified that he did not recall a number of the absences and tardies but Ms. Thomas testified from records and the administrative law judge concludes that the claimant had the absences and tardies as set out. The claimant did attempt to properly report most of the absences and tardies. The claimant argues that he found a replacement and therefore this excused the absence. The administrative law judge is not convinced that simply finding a replacement excuses an absence. One of the things that an employee is expected to do is to obtain a replacement. The administrative law judge is not convinced that it excuses an absence. Further, the claimant found no replacement for December 28, 2004. The evidence also establishes three tardies and the claimant obviously would not have gotten a replacement for those tardies because he was tardy and worked the balance of his shift. The claimant had no driver's license and the employer did try to accommodate the claimant's problematic scheduling but the administrative law judge notes that nevertheless the claimant was absent and tardy as noted above. The claimant received two or three verbal warnings for his attendance. The claimant denies such verbal warnings but his denial is not credible because both Ms. Thomas and the employer's other witness, Helen Jo Boerman, Administrator, testified as to the verbal warnings. The administrative law judge understands an occasional absence or tardy for transportation or car problems but believes that seven absences or tardies in two months because of transportation is unreasonable. It is an employee's responsibility to see that he gets to work and gets to work in a timely fashion. Here, the claimant was also given verbal warnings about his attendance and his tardies. Accordingly, the administrative law judge concludes that the claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$4,495.00 since separating from the employer herein on or about December 29, 2004 in a prior benefit year beginning April 11, 2004. In the new benefit year effective April 10, 2005, the claimant has receive no unemployment insurance benefits. The administrative law judge concludes that the claimant is not entitled to the unemployment insurance benefits in the amount of \$4,495.00 which he has received and, as a consequence, he is overpaid such benefits. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated January 21, 2005, reference 03, is affirmed. The claimant, Edward M. Stenoish, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$4,495.00.

sc/pjs