

**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**

**Appeal Number: 04A-UI-01882-DT  
OC: 04/06/03 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, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

**LORAN D SMITH  
5438 CLIFFLAND RD  
OTTUMWA IA 52501**

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.

**EXCEL CORPORATION  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

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  
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Excel Corporation (employer) appealed a representative’s February 11, 2004 decision (reference 02) that concluded Loran D. Smith (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on March 11, 2004. The claimant participated in the hearing. Nick Statler appeared on the employer’s behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE: Was the claimant discharged for work-connected misconduct? Is the employer’s account subject to charge?

#### FINDINGS OF FACT:

The claimant started working for the employer on June 9, 2003. He worked full time as production worker in the export department of the employer's Ottumwa, Iowa meat processing facility. His last day of work was January 10, 2004. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point attendance policy. Absences are to be reported within a half hour of the start of a shift. The claimant's shift began at 6:15 a.m. As of December 31, 2003, the claimant had accumulated seven points, all at the rate of one point per day for properly reported illness. He had received a warning at the five-point level on or about December 1, 2003. On January 5, 2004, the claimant had been visiting over the weekend in Cedar Rapids, about two hours away from Ottumwa. He started out for work at approximately 3:00 a.m.; however, there was a severe snowstorm in progress, and after about a half hour, the claimant determined it was unsafe to continue. He turned back and returned to the place he had stayed and called the employer before the half hour of the start of his shift to report that he would be absent.

The next day, January 6, the claimant again left Cedar Rapids to drive to Ottumwa. When he was along the Interstate highway about an hour away from the employer's facility, his alternator failed, causing him to walk to a truck stop and call the employer and to call friends for assistance. He did not call in to report his absence until 5:57 a.m. The rest of the day he spent dealing with repairing his vehicle. He reported for work on January 7, 8, and 9, and there was no discussion regarding his absence. Near the end of the shift on January 10, the claimant was discharged for the absence, which had been counted as two points due to the late call in.

The claimant established a claim for unemployment insurance benefits effective April 6, 2003. He filed an additional claim effective January 11, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline for the absence under its attendance policy. Cosper, supra. All the claimant's absences but for the final absence were related to properly reported illness or other reasonable grounds outside the claimant's control; there was not excessive unexcused absenteeism necessary to establish work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code Section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of

the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim.” Iowa Code Section 96.19-3. The claimant’s base period began January 1, 2002 and ended December 31, 2002. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative’s February 11, 2004 decision (reference 02) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer’s account is not subject to charge in the current benefit year.

ld/kjf