

**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**

**MILES D STAFFORD
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ROCK ISLAND IL 61201**

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

**Appeal Number: 04A-UI-08219-RT
OC: 02/08/04 R: 12
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 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Interstate Brands Corporation, filed a timely appeal from an unemployment insurance decision dated July 21, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Miles D. Stafford. After due notice was issued, a telephone hearing was held on August 20, 2004, with the claimant participating. Kelly Green, Assistant Human Resources Manager, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. 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 full-time oven operator from August 21, 2002 until he was discharged on June 23, 2004 for poor attendance. The employer has a policy as shown at Employer's Exhibit One that provides that upon four attendance suspensions the employee will be discharged. The employer also has a policy that an employee call the employer two hours before the start of the employees shift if the employee is going to be absent or tardy. On June 15, 2004, the claimant was absent because of his son. His son did not show up at the babysitter and the claimant had to go find him. The claimant is a single parent and he has had some difficulty with his son getting in trouble. The claimant properly informed the employer that he was going to be absent. Nevertheless, the claimant was discharged because this absence gave the claimant his fourth suspension on June 20, 2004. The claimant was also absent on May 1, 2004 when he showed up for work, but was called away at work because of another problem with his son. The claimant had permission to be away from work and his supervisor told him that if he brought in paperwork validating the son's difficulties it would not count against him. The claimant provided such documentation, but it was nevertheless counted against him and the claimant got a third suspension on May 8, 2004. The claimant was also absent on March 13, 2004 for a court date for his son. The claimant properly reported this absence to the employer. For this absence, the claimant received a second suspension on March 19, 2004. The claimant was absent on January 10, 2004, but neither the claimant nor the employer's witness, Kelly Green, Assistant Human Resources Manager, could state why. The claimant always properly and timely reported his absences to the employer and Ms. Green had no evidence to the contrary. The employer makes no difference for the reason for any absence except for absences due to family and medical leave, which are excused. The claimant also had three other absences in the last half of 2003 as follows: December 6, 2003; October 4, 2003; and July 26, 2003. For one of those absences, the claimant's son was in the hospital. The claimant could not remember the reasons for the other absences nor did Ms. Green state a reason. These absences were properly reported. These absences resulted in a written warning on December 14, 2003 an oral warning with a written record on October 9, 2003 and another oral warning with a written record on July 26, 2003. All of the warnings and suspensions except for the one on July 26, 2003, are shown at Employer's Exhibit Two. The final official reprimand dated June 23, 2004, was actually the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective February 8, 2004 and reopened effective July 4, 2004, the claimant had received unemployment insurance benefits in the amount of \$1,866.00 since separating from the employer herein on or about June 23, 2004 and reopening his claim for benefits effective July 4, 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is 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(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 testified and the administrative law judge concludes that the claimant was discharged on June 23, 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). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The

employer's witness, Kelly Green, Assistant Human Resources Manager, testified that the claimant had seven absences in the last year of his employment. These absences are set out in the Findings of Fact. However, Ms. Green could not testify as to the reason for any of these absences or whether they were properly reported under the employer's policy requiring that an employee notify the employer of an absence two hours before the employees shift. The claimant credibly testified that he always properly and timely notified the employer and the administrative law judge concludes here that the claimant did so for his absences. The claimant also credibly testified that he was a single parent having some difficulties with his son and many of the absences were related to his son including June 15, 2004, May 1, 2004, and March 13, 2004. The claimant had four other absences. One of those, the claimant credibly testified was because his son was in the hospital. The administrative law judge concludes that these absences were for reasonable cause and properly reported and not excessive unexcused absenteeism. Three absences remain without explanation either from Ms. Green or the claimant. However, the claimant credibly testified that he missed some work because of difficulties with his son. The administrative law judge understands an occasional absence for a child. The administrative law judge further notes that here the claimant had seven absences which at first glance would be an unreasonable amount but the administrative law judge concludes that they were spread over a year and are not particularly unreasonable over that period of time. Finally, in general, it requires three unexcused absences to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, at most, the claimant had just three absences that could potentially be not for reasonable cause. There is not a preponderance of the evidence that they were not for reasonable cause and even if so, there would only be three such absences. Accordingly, the administrative law judge concludes that claimant's absences were for reasonable cause and properly reported and are not excessive unexcused absenteeism. It is true that the claimant received a number of warnings and suspensions as set out in the Findings of Fact and that under the employer's policy four suspensions result in a discharge. However, the issue before the administrative law judge is whether the claimant's absences are excessive unexcused absenteeism and as noted above the administrative law judge concludes that they are not.

In summary, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct and, as a consequence, the claimant is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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 \$1,866.00 since separating from the employer herein on or about June 23, 2004 and reopening his claim for benefits effective July 4, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated July 21, 2004, reference 02, is affirmed. The claimant, Miles B. Stafford, is entitled to receive unemployment insurance benefits provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kjf/b