

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

MICHAEL R NABLO
523 E STUART
CLARINDA IA 51632

H & H TRAILER COMPANY
222 - 1ST ST
CLARINDA IA 51632

Appeal Number: 05A-UI-02778-JTT
OC: 02/06/05 R: 01
Claimant: Appellant (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, 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

STATEMENT OF THE CASE:

Michael Nablo filed a timely appeal from the March 3, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 6, 2005. Mr. Nablo participated in the hearing and presented additional testimony from Area Supervisor Jose Navo. Plant Manager Kenny Porter represented the employer and presented additional testimony through Night Shift Supervisor Sean Hargis. Exhibits One through Six and A were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Nablo was employed by H & H Trailer as a full-time Assembler from April 5, 2004 until February 7, 2005, when Night Shift Supervisor Sean Hargis discharged him for excessive absences. Mr. Nablo worked on the second shift, 3:30 p.m. to 11:00 p.m., Monday through Friday.

The absence that prompted the discharge occurred on February 4, 2005, when Mr. Nablo did not appear for his scheduled shift. The employer deemed the absence a no-call/no-show. On January 28, Mr. Nablo had asked Mr. Hargis for permission to leave early on February 4 or take the day off so that he could attend a party for his brother. Mr. Hargis went to Plant Manager Kenny Porter on Mr. Nablo's behalf regarding the request for time off. Mr. Porter denied the request. On February 1, Mr. Hargis advised Mr. Nablo that the request for time off had been denied. Under the employer's attendance policy, an employee was expected to contact the employer prior to the scheduled start of a shift if he needed to be absent. Mr. Nablo telephoned the employer on the morning of February 4, 2005, to notify the employer that he would be absent from his shift and made contact with the office staff. The office staff summoned the plant manager, but Mr. Nablo disconnected before the plant manager could get to the phone. Mr. Nablo picked up his paycheck at the place of employment shortly before the scheduled start of his shift. Mr. Nablo had not been previously reprimanded for attendance.

Mr. Nablo had received prior reprimands for poor work performance. However, the most recent reprimand had been issued in early December 2004.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Nablo was discharged for misconduct in connection with his employment. It does 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 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 employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Nablo's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the employer must show that the unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record indicates that Mr. Nablo's absence on February 4, 2005, was an unexcused absence. However, Mr. Nablo had not previously been reprimanded for attendance and the employer was unable to offer any evidence regarding Mr. Nablo's attendance history. The prior reprimands issued to Mr. Nablo did not concern attendance and had been issued at least two months prior to the employer's decision to discharge Mr. Nablo. Based on the Iowa Supreme Court's ruling in the Sallis case, the administrative law judge concludes that Mr. Nablo was not discharged for misconduct. Accordingly, Mr. Nablo is eligible for benefits, provided he is otherwise eligible.

DECISION:

The representative's decision dated March 3, 2005, reference 01, is reversed. The claimant was discharged from the employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/sc