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-00145-RT
OC: 11/23/03 R: 04
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.

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(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Allied Waste North America, Inc., filed a timely appeal from an unemployment insurance decision dated December 22, 2003, reference 01, allowing unemployment insurance benefits to the claimant, James Robinson. After due notice was issued, a telephone hearing was held on January 27, 2004, with the claimant participating. The claimant was represented by Mark Fowler, Attorney at Law. Timothy Sipes, Operations Manager, and Douglas Collins, Operations Supervisor, participated in the hearing for the employer. Bruce Thomas, General Manager, was available to testify for the employer but not called because his testimony was

unnecessary and would have been repetitive. The employer was represented by Renee Crawley of ADP Unemployment Group-James E. Frick, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Claimant's Exhibits A and B were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibits A and B, the administrative law judge finds: The claimant was employed by the employer as a full-time route driver from June 1, 2001 when a previous employer was purchased and taken over by the present employer, until he separated from his employment on November 14, 2003. On that day, the claimant did not appear for work at the start time, but came in to get his check and was informed by Timothy Sipes, Operations Manager, and one of the employer's witnesses, that he had not come to work that day or the previous day and since he was a no-call/no-show he was terminated. The claimant's usual work time began at 4:00 a.m. and lasted until approximately 2:45 p.m. On November 10, 2003, the claimant appeared for work and worked at that time on that day. He had a doctor's appointment that day and attended the doctor's appointment. At approximately 5:00 p.m., the claimant called Mr. Sipes and told him that he had been to the doctor and that he had a doctor's slip prescribing restricted duty for the claimant. This is shown at Claimant's Exhibit A. On November 11, 2003, the claimant was absent from work. Douglas Collins, Operations Supervisor and one of the employer's witnesses, attempted to call the claimant several times. Finally, at approximately 1:40 p.m., the claimant called Mr. Collins. At that time, Mr. Collins informed the claimant that he was on light duty and he was to report to work at 8:00 a.m. the next day. It is uncertain whether Mr. Collins informed the claimant that his start time would continue to be 8:00 a.m. or just for the next day, Wednesday, November 12, 2003. In any event, the claimant appeared for work as requested on November 12, 2003, but had to leave early to go to another doctor's appointment. The employer permitted the claimant to leave work early. The claimant then called the employer and spoke to Mr. Collins and told Mr. Collins that he was dizzy and could not return to work. Mr. Collins said that was all right. Whether the claimant mentioned the next day, November 13, 2003 is uncertain. The claimant did not show up for work on November 13, 2003 because he believed that he had informed Mr. Collins the previous day that he would also not be at work that day. The claimant did not show up for work on November 14, 2003 because he didn't think that he had to work since no one had called him about coming in to work. The claimant believed that he was to be called by the employer as to when he was to report to work. The claimant came in later on November 14, 2003 to get his check and met with Mr. Sipes and others and was told at that time that the was terminated.

The employer has a policy that provides that two consecutive absences as a no-call/no-show is a voluntary quit and further that an employee needs to notify the employer of absences. This is in the employer's absentee policy and work rules, a copy of which the claimant received and for which he signed an acknowledgement. At some point, either on November 11 or 12, 2003, the claimant informed Mr. Collins that he was on medication that had a deleterious effect on his health and he could not drive the employer's vehicle. Mr. Collins was aware on November 11, 2003 that the claimant was on restricted duty. The claimant had never had an attendance problem prior to November 10, 2003 nor had he ever received any warnings or disciplines for attendance. The claimant had never expressed any concerns to the employer about his working conditions nor had he ever indicated or announced an intention to quit if any of his concerns were not addressed. The claimant had not specifically asked for any accommodations but the employer had provided light duty for the claimant beginning on

November 12, 2003. The claimant's medical consultations and light duty were brought about by some kind of injury on or about October 6, 2003.

Pursuant to his claim for unemployment insurance benefits filed effective November 23, 2003, the claimant has received unemployment insurance benefits in the amount of $2,700.00 as follows: $300.00 per week for nine weeks from benefit week ending November 29, 2003 to benefit week ending January 24, 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 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(1) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

871 IAC 24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
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> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Iowa Code Section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 the claimant quit when he was absent for two days in a row on November 13 and 14, 2003 without notifying the employer. The claimant maintains that he was discharged when he spoke to Timothy Sipes, Operations Manager, on that day and was informed that he had been terminated. 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 left his employment voluntarily. First, the rule above cited indicates that it is a voluntary quit when the claimant is absent for three days without giving notice to the employer in violation of company rules. Even assuming that the claimant was absent without giving notification to the employer,

the evidence only establishes two consecutive days of absences which does not comply with the above cited rule. Further, the administrative law judge concludes that the employer has failed to demonstrate that the claimant did not properly inform the employer of at least one of the absences, November 13, 2003. The claimant testified that he spoke to Mr. Collins on November 12, 2003 after seeing a doctor and informed Mr. Collins that the medication was causing him to be dizzy and he could not work and he would not be able to work the next day, November 13, 2003. Mr. Collins denies this but concedes that the claimant did call him and said that he would not be able to return to work and Mr. Collins said that was okay. Even if the claimant had not specifically told Mr. Collins that he was not going to be at work on the 13th, Mr. Collins should have reasonably assumed that the claimant would not be at work for the same reason when he did not show up. Mr. Collins testified that he knew the claimant was on light duty as of November 11, 2003 because he told the claimant as much when the claimant called him on that day. The claimant did not show up for work on November 14, 2003 at the time he was scheduled to work at 8:00 a.m. but did show up later to get his check. He did not show up to work on that day because he did not think he had to work since he was not called to come to work because the claimant testified that he had been told by Mr. Collins that he was not needed on November 13, 2003. The employer also alleges that the claimant was absent on November 10 and 11, 2003 without notifying the employer, but the claimant credibly testified that he worked on November 10, 2003 coming in at his regular start time at 4:00 a.m. and leaving at approximately 2:45 p.m. to attend a doctor's appointment. The employer really doesn't seem to contest that the claimant worked at that time and there was no employer's witness who was present at the employer at that time to verify whether the claimant worked or not. Accordingly, the administrative law judge concludes that the claimant worked that day. The claimant also testified that he called Mr. Sipes on that day in the afternoon and told him that he had a doctor's slip restricting his work. Mr. Sipes did not contest this and the administrative law judge concludes it must have occurred because Mr. Sipes himself testified that on November 11, 2003, he informed the claimant that the claimant was to report to work on November 12, 2003 for light duty. Mr. Collins was aware at least by November 11, 2003 that the claimant was on light duty.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was not absent the requisite three days without informing the employer so as to establish a quit and further, the administrative law judge concludes that the claimant was not absent two days in a row without notifying the employer in some reasonable fashion which would cause a quit per the employer's policy. Therefore, the administrative law judge concludes that the claimant did not voluntarily leave his employment but was discharged on November 14, 2003.

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). It is well established that the employer has the burden to prove disqualifying misconduct. 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, including, excessive unexcused absenteeism. The employer produced no evidence of any acts on the part of the claimant that would be deliberate acts or omissions constituting a material breach of his duties and/or that would evince a willful or wanton disregard of the employer's interests and/or were carelessness or negligence in such a degree of recurrence as to establish

disqualifying misconduct, except for the claimant's absences. The issue really boils down to whether the claimant's absences were excessive unexcused absenteeism and disqualifying misconduct. The administrative law judge concludes that here they are not.

Prior to November 10, 2003, the parties agree that the claimant had no attendance problems and had received no warnings or disciplines for his attendance. The only potential absences the claimant had were November 10 and 11, 2003 and November 13 and 14, 2003. The claimant worked on November 12, 2003. He did leave work early to go to a doctor, but he had permission to do so and he didn't return to work because he was dizzy from the medication but this also was approved by the employer. This occasion then would be for reasonable cause and personal illness and not excessive unexcused absenteeism. On November 10, 2003, the claimant credibly testified without real contest from the employer that he actually worked that day but did leave for a doctor's appointment. The period that the claimant was away from his work for a doctor's appointment was for reasonable cause and personal illness and would not establish excessive unexcused absenteeism for that day. The claimant's testimony that he had a doctor's appointment on that day is supported by Claimant's Exhibit A, which indicates that the claimant was placed on restricted duty on that day and also is a patient status report dated that day.

The claimant was absent on November 11, 2003. The claimant credibly testified that he informed Mr. Sipes on November 10, 2003 that he would not be in on the 11th because he was on restricted duty. Again, the claimant's documentary evidence confirms this as does Mr. Sipes testimony that he told the claimant on November 11, 2003 that he was to come to work the next day on light duty. Mr. Collins must have known then that the claimant was on restricted duty and was to receive light duty. There was some evidence that the employer received Claimant's Exhibit A from the doctor on November 11, 2003 and learned of the claimant's light duty at that time. Even if the claimant had not informed the employer of the reason for his absence on November 11, 2003 when the employer received the statement from the doctor which is Claimant's Exhibit A it should have been aware that the claimant was on light duty and his absence would have been for reasonable cause and personal illness. The administrative law judge so concludes. The claimant was absent on November 13, 2003 because he believed that he had been informed by Mr. Collins the previous day that he would not be needed for work on that day because he was on light duty. Mr. Collins denies this but the administrative law judge concludes that whatever occurred in the conversation between the claimant and Mr. Collins on November 12, 2003, the claimant was at least justified in believing he did not have to show up for work on November 13, 2003. Therefore, the administrative law judge concludes that this absence was for reasonable cause and properly reported or proper reporting was not necessary according to the claimant's justifiable beliefs. The claimant was absent on November 14, 2003 because he did not think he had to work. The administrative law judge is not convinced that the claimant's absence on November 14, 2003 was for reasonable cause or personal illness nor was it properly reported. The claimant agreed that he did not call the employer that day and really had no satisfactory explanation as to why he did not think he should be at work except that the employer had not called him. The administrative law judge concludes that this absence was not for reasonable cause or personal illness and not properly reported.

In summary, of all of the potential absences, the administrative law judge concludes that the only absence that the claimant had that was not for reasonable cause or personal illness and not properly reported was the absence on November 14, 2003. Generally, three unexcused absences are required to establish excessive unexcused absenteeism. See for example Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here the claimant

only had one absence. Even assuming that one of the other absences also was not for reasonable cause or properly reported that would only establish two unexcused absences. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. The administrative law judge specifically notes that the claimant had not had an attendance problem prior to November 10, 2003 nor had he ever received any warnings or disciplines. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified 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.
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> 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 $2,700.00 since separating from his employer on or about November 14, 2003 and filing for such benefits effective November 23, 2003. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decisions of December 22, 2003, reference 01 is affirmed. The claimant, James Robinson, is entitled to receive unemployment insurance benefits provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

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