

**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**

**WILLIAM D WATSON
213 CLAYTON ST
OTTUMWA IA 52501**

**BLOOMFIELD FOUNDRY INC
PO BOX 200
BLOOMFIELD IA 52537-0200**

**JOHN O HARALDSON
ATTORNEY AT LAW
ONE CORPORATE PL STE 110
1501 42ND ST
WEST DES MOINES IA 50266**

**Appeal Number: 04A-UI-09885-RT
OC: 08/22/04 R: 03
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
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, William D. Watson, filed a timely appeal from an unemployment insurance decision dated September 9, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on October 5, 2004, with the claimant participating. The claimant was represented by John O. Haraldson, Attorney at Law. Jack Matheny, General Supervisor, participated in the hearing for the employer, Bloomfield Foundry, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Claimant's Exhibits A, B, and C were admitted into evidence. By letter dated September 17, 2004, the claimant, by his attorney, requested that a subpoena issue for his personnel file. The administrative law judge issued a subpoena and the employer appropriately complied by

sending copies of the claimant's personnel file both to the claimant's attorney and to the administrative law judge.

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, B, and C, the administrative law judge finds: The claimant was employed by the employer as a full-time secondary grinder from February 12, 2004 until he was discharged on August 23, 2004 for poor attendance. On August 19 and 20, 2004, the claimant was in the hospital committed there because of alcoholism. His hospitalization is confirmed at Claimant's Exhibit B. On August 19, 2004, the claimant's friend and co-worker delivered a doctor's slip to the employer informing the employer that the claimant was in the hospital and did not know when the claimant would be back at work. The claimant himself did not call in on either day. The claimant returned to work on August 23, 2004 and was discharged. The employer has a policy of which the claimant was aware that an employee himself must call the employer before the start of a shift if that employee is going to be absent or tardy. On August 12, 2004, the claimant left work early for personal illness and he had permission from the employer to do so. On June 25, 2004, the claimant was absent for personal illness and this was properly reported. On June 23, 2004, the claimant left work early because he got something in his eye at work and he had permission to leave work early. On June 16, 2004, the claimant left work early because of personal illness and he had permission to do so. On May 24, 2004, the claimant again left work early because of personal illness and he had permission. On March 16, 2004, the claimant was tardy 15 minutes because he lost power at home and his alarm clock did not properly work. The claimant properly reported this tardy.

On March 5, 2004, the claimant left work early because of illness and he had permission from the employer. On February 23, 2004, the claimant was tardy one-half hour because of bad weather and he properly reported this tardy. The employer had no evidence that the claimant was not ill on the occasions so stated and some of the claimant's illness are confirmed by Claimant's Exhibit C. The claimant received no written warnings, but did receive some oral warnings, two from the lead man Jimmy Tavera and one from Supervisor Pat Stephens. Since the claimant's separation from his employment, he has placed no restrictions on his ability or availability for work and is earnestly and actively seeking work by making two in-person job contacts each week. Although the claimant has received no unemployment insurance benefits since separating from the employer herein and filing for such benefits effective August 22, 2004, Iowa Workforce Development records show that the claimant is overpaid unemployment insurance benefits in the amount of \$22.00 for 2001.

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 ineligible to receive unemployment insurance benefits because he is and was at relevant times not able, available, and earnestly and actively seeking work. The claimant is not ineligible for these reasons.

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 August 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. Prior to

the two absences on August 19 and 20, 2004, the claimant had five occasions when he left work early for personal illness and had permission to do so and further one absence also for personal illness and this was properly reported. The employer had no evidence that these absences were not for personal illness and some of these absences are confirmed by doctor's statements at Claimant's Exhibit C. In addition, the claimant had two tardies. One tardy was for 15 minutes when the power went out and the claimant's alarm did not work and the other tardy was for bad weather. Both of these were properly reported. The administrative law judge understands an occasional but rare tardy for such reasons. Accordingly, the administrative law judge concludes that all of these absences and tardies and occasions when the claimant left work early were for reasonable cause or personal illness and were properly reported and were not excessive unexcused absenteeism.

The remaining two absences were on August 19 and 20, 2004 when the claimant was hospitalized under a court commitment for alcoholism. The employer maintains that these were not excused. The administrative law judge disagrees. Under these circumstances where the claimant was committed by a court for alcoholism and was in the hospital and his physician issues a statement as shown at Claimant's Exhibit B, the administrative law judge concludes that the claimant was absent for personal illness. Although the claimant did not call in, the administrative law judge understands why he did not. Nevertheless, the claimant had his friend and co-worker deliver the doctor's slip to the employer on August 19, 2004 and inform the employer that he did not know when the claimant would be back at work. Under these circumstances, the administrative law judge concludes that these absences also were for personal illness and were properly reported and were not excessive unexcused absenteeism. Further, generally three unexcused absences or tardies are required to establish disqualifying misconduct. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant would at most have had two. Finally, the administrative law judge notes that the claimant received no written warnings. He did receive three verbal warnings but there were no dates listed. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences and tardies and occasions when he left work early were not excessive unexcused absenteeism and not disqualifying misconduct. 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. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a 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 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements

of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden to prove that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he is and was at relevant times able, available, and earnestly and actively seeking work. The claimant credibly testified that since separating from the employer herein he has placed no restrictions on his ability or availability for work and is earnestly and actively seeking work by making two in-person job contacts each week. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits.

DECISION:

The representative's decision dated September 9, 2004, reference 01, is reversed. The claimant, William D. Watson, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. The claimant is able, available, and earnestly and actively seeking work.

kjf/b