

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

BRIDGET L WATERBECK
1031 – 5TH AVE SE
CEDAR RAPIDS IA 52403

HARDEES FOOD SYSTEMS INC.
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-01273-RT
OC: 09/28/03 R: 03
Claimant: Respondent (1-R)

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, Hardee's Food Systems, Inc., filed a timely appeal from an unemployment insurance decision dated January 27, 2004, reference 06, allowing unemployment insurance benefits to the claimant, Bridget L. Waterbeck. After due notice was issued, a telephone hearing was scheduled on February 26, 2004 at 2:00 p.m. However, the administrative law judge was unable to reach the claimant at the telephone number she had called in. The employer did not call in a telephone number either before the hearing or 15 minutes after the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer is represented by TALX UC eXpress, who is well aware of the need to call in a telephone number if the employer wants to participate in the hearing. The

administrative law judge twice tried to call the number that the claimant had previously provided. It was the same number that appears in Workforce Development records for the claimant and was the number used by the fact finder. No one answered the phone, but a voice mail came on the line identifying the number as JPF. On the first call, the administrative law judge left a message for the claimant that he was going to wait 15 minutes and she needed to call within that time if she wanted to participate in the hearing. Otherwise, the administrative law judge would decide the case based upon the administrative file. The administrative law judge provided an 800 number for the claimant to use. As of 2:20 p.m., neither the claimant nor the employer had called the administrative law judge. Consequently, no hearing was held. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The claimant called the administrative law judge at 2:27 p.m. on February 26, 2004, when it was too late to hold the hearing. She informed the administrative law judge that she had provided the number that he had called but due to a family emergency she was not at that number. The claimant stated that she attempted to call Workforce Development at 2:00 p.m. for the hearing and stated that the line was busy and she could not get through until 2:27 p.m. This is not credible since telephone calls to the Appeal Section are rotated across several different phones and she should have been able to reach someone. Further, the claimant said that she did not know she would be at a different phone until last night. However, the claimant had no explanation as to why she did not call the administrative law judge or the Appeals Section in the morning of February 26, 2004 and provide a new telephone number. Apparently, she was at a new telephone number because she was able to reach the administrative law judge by telephone. The administrative law judge informed the claimant that he would treat her telephone call as a request to reschedule the hearing. The administrative law judge concludes that the claimant has not demonstrated good cause for rescheduling the hearing and the claimant's request for such rescheduling is denied. Further, the administrative law judge concludes that because of the decisions reached herein, it is not necessary to reschedule the hearing for the claimant.

FINDINGS OF FACT:

Having examined the record, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on January 27, 2004, reference 06, determining that the claimant was eligible to receive unemployment insurance benefits because records indicate that she was dismissed from work on January 5, 2004 for alleged misconduct, but the employer did not furnish sufficient evidence to show misconduct.

Pursuant to her claim for unemployment insurance benefits filed effective September 28, 2003, and reopened effective January 4, 2004, the claimant has received no unemployment insurance benefits. Records indicate the claimant is still disqualified for not being able and available for work. This must be pursuant to a decision by an authorized representative of Iowa Workforce Development dated November 6, 2003, reference 05, concerning the employer J & S Construction Flagging.

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. She 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) 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).

(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.

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 did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence of such a degree of recurrence so as to establish disqualifying misconduct. The employer also failed to provide sufficient evidence of absences or tardies on the part of the claimant that would constitute excessive unexcused absenteeism. There is no protest appearing in the administrative file. The employer did not participate in fact finding, but the claimant did so and stated that she was discharged on January 5, 2004 because of absenteeism. The claimant further stated that she had court that day and had previously approved the time off. The claimant called the store manager, but was told that she did not need her help anymore. The claimant also stated that she had never received any warnings for "this" meaning attendance. The claimant stated that she was told to take the time off that she needed. In its appeal letter, the employer's representative merely says that the claimant was separated due to disqualifying reasons. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant had absences that were not for reasonable cause and not properly reported and were excessive unexcused absenteeism and disqualifying misconduct.

Therefore, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she 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 there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant the disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Workforce Development records indicate that the claimant is still disqualified to receive unemployment insurance benefits because she was not able and available for work pursuant to a decision by an authorized representative of Iowa Workforce Development dated November 6, 2003, reference 05, related to her continued employment with J & S Construction Flagging. The administrative law judge does not have jurisdiction to inquire into this issue, but in order to determine if the claimant is otherwise eligible or entitled to unemployment insurance benefits this matter should be remanded to claims for an investigation and determination as to whether the claimant remains ineligible to receive unemployment insurance benefits because she is and was not able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3.

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 no unemployment insurance benefits since filing for unemployment insurance benefits effective September 28, 2003 and reopening her claim effective January 4, 2004 following her separation from the employer on January 5, 2004. Consequently, the claimant is not overpaid any unemployment insurance benefits and even if she had received unemployment insurance benefits after reopening her claim, she would not be overpaid those benefits pursuant to her separation from her employer herein.

DECISION:

The representative's decision of September 28, 2003, reference 06, is affirmed. The claimant, Bridget L. Waterbeck, is entitled to receive unemployment insurance benefits provided she is otherwise eligible. However, workforce records indicate that the claimant continues to be ineligible to receive unemployment insurance benefits because she is and was not able and available for work pursuant to a decision by an authorized representative of Iowa Workforce Development dated November 6, 2003, reference 05 having to do with her still being employed with J & S Construction Flagging. In order to determine whether the claimant is still ineligible to receive unemployment insurance benefits for this reason or whether she is now eligible to receive unemployment insurance benefits, this matter must be remanded to claims for an investigation determination as to whether the claimant is ineligible to receive unemployment insurance benefits because she is and was at all material times hereto, not able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

REMAND:

This matter is remanded to claims for an investigation determination as to whether the claimant remains ineligible to receive unemployment insurance benefits because she is and was, at all material times hereto, not able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 as she was initially determined by decision dated November 6, 2003, reference 05.

kjf/b