

**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**

**DAVID A CRAFT
1628½ RIPLEY ST
DAVENPORT IA 52803**

**APAC CUSTOMER SERVICES OF IA LLC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-06669-RT
OC: 05-23-04 R: 04
Claimant: Respondent (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 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, APAC Customer Services of Iowa LLC, filed a timely appeal from an unemployment insurance decision dated June 7, 2004, reference 01, allowing unemployment insurance benefits to the claimant, David A. Craft. After due notice was issued, a telephone hearing was held on July 13, 2004 with the claimant participating. Turkessa Hill, Human Resources Coordinator, participated in the hearing for the employer. Kelly Williams, Training Manager, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The employer was represented by Ralph McGlothlen of

TALX UC eXpress. 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, most recently for four years as a full-time trainer, from October 11, 1999 until he was discharged on May 19, 2004 for poor attendance. The claimant's shift, at all material times hereto, began at 2:00 p.m. The employer has a rule that for certain employees, including trainers, they are to call in and inform the employer of an absence or a tardy two hours prior to the start of their shift. This rule was in writing and signed by the claimant, and the claimant was aware of this rule. On May 18, 2004, the claimant was late to work. He called the employer between 3:45 and 4:11 p.m., informing the employer that he was going to be tardy. The claimant did not return to work until 9:52 p.m. The claimant was already late coming to work when he had an illness which caused him to go home and could not call the employer until 3:45 p.m. and then went to sleep and did not get to work until 9:52 p.m. The claimant was absent on May 7, 2004 when he was out of town when he had car trouble. He called the employer at 4:11 p.m. and notified the employer that he would be late but the claimant never showed up to work and never called the employer again. For this absence the claimant got a first and final warning. The claimant testified that he did not call the employer again because he had no more money to pay for a long distance phone call on a pay phone but the employer has an "800" number it provides to employees, including the trainer, and the claimant had been a trainer for four years and was used to giving out that number to others. On March 15, 2004, the claimant received an action plan concerning attendance. On March 9, 2004, the claimant was absent because he was in jail and this was unrelated to his employment. He properly called the employer on this occasion. The claimant got a written warning for his attendance on March 5, 2004. On February 24, 2004, the claimant was tardy. The claimant called in late at 4:00 p.m. and then arrived at work at 7:17 p.m. The claimant was absent on February 10 and February 11, 2004 because of a migraine headache. On February 10, 2004, the claimant did not call the employer until 8:00 p.m. and then on February 11, 2004, the claimant called the employer after 4:00 p.m. On January 28, 2004, the claimant was tardy for car problems. He called the employer at 4:00 p.m. and arrived at 5:49 p.m.

Pursuant to his claim for unemployment insurance benefits filed effective May 23, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,100.00 as follows: \$300.00 per week for seven weeks from benefit week ending May 29, 2004 to benefit week ending July 10, 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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 administrative law judge concludes that the claimant was discharged on May 19, 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. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met 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 findings of fact outline all of the claimant's absences and tardies. The claimant's shift began at 2:00 p.m. and, according to the employer's rule of which the claimant was aware, he needed to call in and inform the employer of an absence or a tardy two hours prior to his shift or

12:00 p.m. The claimant did not properly and timely report any absence or tardy as set out in the findings of fact except the absence on March 9, 2004 when he was in jail. The claimant gave a variety of excuses for not promptly informing the employer of his tardies or absences including a severe migraine headache, illness from diarrhea and not able to pay for a long distance phone call. The claimant's excuses are not credible. The administrative law judge does not understand how the claimant can fail to call the employer timely two days in a row for a migraine headache. All it takes is a brief phone call. The evidence also establishes the employer had an "800" number that employees could call and the claimant had been teaching this number for four years. The claimant had received a written warning on or about March 5, 2004, a written action plan on March 15, 2004, and a first and final written warning on May 7, 2004, all for attendance. The claimant should have been well aware that the employer was concerned about his attendance and that he needed to call in promptly every absence or tardy but the claimant persisted in failing to do so. The administrative law judge also concludes that the claimant's tardy on May 18, 2004 was not for reasonable cause or personal illness. The claimant testified that he was ill but that he took medication and went to sleep and then did not show up for work until 9:52 p.m. Apparently, the claimant was well enough to come to work at some point but went to sleep instead. The administrative law judge also concludes that the claimant's absence on May 7, 2004 was not for personal illness or reasonable cause because he was out of town right before he was to go to work when his car broke down. The administrative law judge further concludes that the claimant's absence on March 9, 2004 when he was in jail, unrelated to employment, is also not for reasonable cause or personal illness. The administrative law judge also concludes that the claimant's tardy on February 24, 2004 was not for reasonable cause or personal illness. The claimant could not remember why he was tardy although it was a personal issue. The claimant was tardy over five hours. Accordingly, the administrative law judge concludes that at least four of the claimant's tardies or absences were not for reasonable cause or personal illness and that all but one were not properly reported and were excessive unexcused absenteeism and disqualifying misconduct.

The administrative law judge concludes that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$2,100.00 since separating from the employer herein on or about May 19, 2004 and filing for such benefits effective May 23, 2004, to which he is not

entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of June 7, 2004, reference 01, is reversed. The claimant, David A. Craft, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,100.00.

tjc/kjf