

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

SERIF HIDIC
3817 – 66TH APT 72
URBANDALE IA 50322

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DES MOINES IA 50314

Appeal Number: 04A-UI-03631-S2T
OC: 02/29/04 R: 02
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:

Serif Hidic (claimant) appealed a representative's March 25, 2004 decision (reference 02) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Tyson Fresh Meats (employer) for excessive unexcused absenteeism. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 24, 2004. The claimant participated personally through Zeljka Krvavica, Interpreter. The employer participated by Tom Barragan, Employment Manager and Mike Cleaver, Training Coordinator.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 3, 2003, as a full-time plant interpreter. The claimant received a copy of the employer's attendance policy and signed for its receipt on February 3, 2003. An employee was supposed to report his absence from work 30 minutes prior to the start of his shift. The employer terminated employee's who accumulated 15 or more attendance points. As an interpreter, the claimant would be terminated if accumulated 6 attendance points. The claimant had received no warnings during his employment.

The claimant was sponsoring his family so they could come to the United States from Bosnia. The family was supposed to arrive in the Des Moines, Iowa, International Airport. On February 22, 2004, the claimant received an emergency call from his family. Somehow they had landed in Texas. Authorities would not allow the family to leave the airport unless they were released to the claimant. At 8:00 a.m. on February 23, 2004, the claimant contacted his supervisor indicating he would have to travel to Texas to retrieve his family. The supervisor told the claimant to make telephone calls to the airport and call the supervisor back within the hour. The supervisor told the claimant not to worry about being absent. The claimant made three telephone calls trying to reach the supervisor, but the supervisor could not be found. The claimant made contact with the supervisor on Wednesday, February 26, 2004. The claimant described his situation and indicated he would be back in the Des Moines area on Friday, February 27, 2004. The claimant left for Texas Monday morning, arrived in Texas on Tuesday, left Texas on Wednesday and arrived in the Des Moines area on Friday, February 27, 2004.

On Monday, March 2, 2004, the claimant appeared for work. The employer told the claimant he had accrued three points for each day of the week before because he did not appear for work or notify the employer of his absence for five days. The employer did not wish to terminate the claimant and hoped he would continue work as a production worker. The employer terminated the claimant on March 2, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was 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).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Three incidents of tardiness or absenteeism after a warning constitutes misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). A single unexcused absence does not constitute excessive unexcused absenteeism, even though claimant disregarded employer's instructions to call back with further information about situation. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide any evidence of warnings given to the claimant regarding his attendance. The claimant appears to have had one incidence of absenteeism, which covered five days. The claimant notified the employer of his absence and was told not to worry about the absence. The claimant's single incident of absenteeism does not rise to the level of misconduct. The employer testified that the claimant was welcome to continue working for the employer in a different capacity. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's March 25, 2004 decision (reference 02) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/kjf