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

PATRICIA L ERWIN
4422 STATE ST TRLR 22C
BETTENDORF IA 52722-7177

IOC SERVICES LLC
1641 POPPS FERRY RD B1
BILOXI MS 39532-2226

Appeal Number: 06A-UI-02335-RT
OC: 01/29/06 R: 04
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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Patricia L. Erwin, filed a timely appeal from an unemployment insurance decision dated February 15, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on March 15, 2006, with the claimant participating. Tammy Kadlec, Human Resources Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. At 12:06 p.m. on March 10, 2006, the administrative law judge called and spoke to the claimant in response to a message from the claimant. Initially, the claimant requested that the hearing be rescheduled because she had a part-time job. When the administrative law judge inquired as to when the claimant

would be available for another hearing, the claimant checked her schedule and decided that she did not need the hearing rescheduled and that she would be available for the hearing. The claimant participated in the hearing.

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 as a full-time line or grill cook from May 2, 2005, until she separated from her employment on January 18, 2006. On January 15, 2006, the claimant left work early before her shift was over. The claimant did so because her supervisor, Thomas Beaulieu, told her to because the grill was not busy. The claimant did complete her "side" work but forgot to do the check off list verified by her supervisor. The claimant forgot to do so because Mr. Beaulieu was anxious to have the claimant leave. The claimant knew she was supposed to do the check off list and had done so on prior occasions. When the claimant returned for her next shift on January 18, 2006 she was informed by the grill manager, Tim Smith, that she had abandoned her job on January 15, 2006 and the employer was treating it as a quit. The claimant believed that she was discharged at that time.

The claimant received a final written warning for insubordination on August 26, 2005 when she refused two times to step off the line when requested to do so by Mr. Beaulieu. The claimant also received a written warning on December 19, 2005 for attendance when she was absent on December 10 and 11, 2005 for personal illness. These absences were properly reported. The claimant also received a written counseling on August 29, 2005 for six tardies prior to that time. The claimant was tardy because of traffic or because she forgot items required for work or because she had to help her daughter with her new granddaughter.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It 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, (7) (8) 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.
>
> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she walked off the job on January 15, 2006. The claimant maintains that she was discharged on January 18, 2006 when she returned to work and was basically told that she could no longer continue to work because she had abandoned her job and was considered to have quit on January 15, 2006. 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 her employment voluntarily. The evidence is uncontroverted that the claimant walked off the job or left her job early on January 15, 2006. The claimant testified that she was told to do so by her supervisor, Thomas Beaulieu. The employer's witness, Tammy Kadlec, Human Resources Manager, testified as to a written statement by Mr. Beaulieu denying this. This testimony is hearsay and although the claimant's testimony is not particularly credible, the administrative law judge concludes that the claimant's first-hand testimony, while not particularly credible, is more credible than the hearsay evidence of Miss Kadlec. Further, returning to work on January 18, 2006, belies a voluntary quit. Accordingly, the administrative law judge concludes that the claimant was discharged on January 18, 2006.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of 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 a current act of 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 demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including, excessive unexcused absenteeism. The only reason possible for the claimant's discharge was her walking off the job early before her shift was over on January 15, 2006 when she failed to complete a check off list. Concerning walking off the job, the administrative law judge concludes that the claimant was instructed to do so, as noted above, by her supervisor, Thomas Beaulieu. Accordingly, the administrative law judge concludes that the claimant's leaving work early or walking off the job early on January 15, 2006 was not a deliberate act constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor did it evince a willful or wanton disregard of the employer's interest nor was it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant concedes that she did not complete her check off list but seems to state that she either forgot or Mr. Beaulieu was in a hurry to have the claimant leave. In any event, the claimant did not finish the check off list which is required before one can leave work and the claimant was aware that this check off list needed to be completed. The administrative law judge is constrained to conclude here that the claimant's failure to do the check off list was, at most, an isolated instance of negligence and is not disqualifying misconduct. The administrative law judge notes that the claimant had not received any warnings or disciplines for her failure to do a check off list in the past.

Concerning the claimant's attendance, the claimant did have a problem with tardies in May, June and July of 2005 and received a written counseling for this on August 29, 2005. These tardies were for traffic or because the claimant forgot items required at work or to help her daughter with her new granddaughter. These tardies were not properly reported. The administrative law judge concludes that these tardies were not for reasonable cause or personal illness and not properly reported. However, these tardies occurred five months before the claimant's discharge. A discharge for these tardies would be for past conduct and a discharge for misconduct can not be based on past acts. Past acts and warnings can be used to determine the magnitude of a current act of misconduct but the administrative law judge concludes, as noted above, that there was no current act of disqualifying misconduct on the part of the claimant. The administrative law judge notes that the claimant did receive a written warning for her attendance on December 19, 2005 but this was for two absences for personal illness and which were properly reported. These absences would not be excessive unexcused absenteeism. Finally, the administrative law judge notes that the claimant did receive a final written warning for insubordination on August 26, 2005 but the administrative law judge is not convinced that this warning, for insubordination, and coming almost five months before the claimant's discharge, is relevant or establishes disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant's walking off the job coupled with her other absences and tardies was not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that there is not a preponderance of the evidence of any disqualifying misconduct on the part of the claimant. Therefore, the administrative law judge concludes that the claimant was discharged on January 18, 2006, 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, including the evidence therefore. 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 her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of February 15, 2006, reference 01, is reversed. The claimant, Patricia L. Erwin is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

cs/tjc